Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

HALLEEN CHEVROLET, INC. and CHARLES HALLEEN,

Petitioners,

v.

GENERAL MOTORS CORPORATION and
FAIRCHILD CHEVROLET, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a civil litigant deprived of due process rights when a substitute hearing examiner, who did not preside over a lengthy hearing, weighs the credibility of fact and expert witnesses, balances public interest factors, and then makes a decision from a cold record?

2. Is a civil litigant deprived of due process rights when an administrative board refuses to grant a *de novo* hearing or conduct its own independent review of a substitute hearing examiner's recommendation made from a cold record?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties identified in the caption, Halleen Chevrolet, Inc. and Charles A. Halleen (Petitioners), and General Motors Corporation and Fairchild Chevrolet, Inc. (Respondents), were parties before the Ohio Supreme Court and Court of Appeals.

Petitioner, Halleen Chevrolet, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners, Halleen Chevrolet, Inc. and Charles Halleen, respectfully request that a writ of certiorari be issued to review the order of the Court of Appeals of Ohio, Tenth Appellate District.

OPINIONS BELOW

On October 24, 2001 (App. C), the Ohio Supreme Court declined to accept jurisdiction in this case. The unpublished opinion of the court of appeals is captioned *Halleen Chevrolet, Inc. et al. v. General Motors Corporation et al.* (June 28, 2001), Tenth District case no. 00AP-1454 and can be found at 2001 WL 722101 (App. A). The unpublished opinion of the common pleas court is captioned *Halleen Chevrolet, Inc. et al v. General Motors Corporation* (December 4, 2000), Case No. 99CVE-12-10512 (App. B). The letter of the Ohio Motor Vehicle Dealers Board (November 22, 1999) approving the substitute hearing examiner's recommendations, without any further deliberations, is unpublished. (App. E).

STATEMENT OF JURISDICTION

The order of the Ohio Supreme Court was entered on October 24, 2001 (App. C). The Ohio Supreme Court denied a timely petition for reconsideration on December 5, 2001 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Ohio Revised Code § 4517.57(A) specifically requires the administrative Ohio Motor Vehicle Dealers Board ("OMVDB") tribunal to act as follows:

> Subject to sections 119.01 to 119.13 of the Revised Code, **the board shall designate an attorney at law as a hearing officer, who shall hear and consider the oral and documented evidence** introduced by the parties and other interested individuals and groups, **and issue his findings and recommendations to the board within thirty days following the close of the hearing**.

(Emphasis added).

STATEMENT OF THE CASE

The fundamental questions are: (i) whether a civil litigant is denied procedural due process when a substitute hearing examiner, who is the sole factual adjudicator, bases his decision only upon review of a "cold record," without conducting a *de novo* hearing, and (ii) subsequently the administrative Ohio Motor Vehicle Dealers Board fails to hold a *de novo* hearing or conduct an independent review of the substitute hearing examiner's decision, resulting in an automatic adoption of his decision, without any meaningful review.

This case presents a critical question of constitutional due process affecting a multitude of federal and state civil and administrative litigants who rely on hearing officers. This Court has long recognized the significance of protecting the rights of civil litigants by requiring meaningful hearings: "[t]he one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481, 56 S. Ct. 906, 912 (1936). The fact finder must observe the witnesses' demeanor, and then weigh and balance the conflicting fact and expert testimony. *Id.* Accordingly, a substitute hearing examiner, who was appointed eight (8) months after an original nine (9) days of oral hearing and who only reviewed a "cold record", violated petitioners' constitutional due process rights to have a meaningful hearing.

A. Background of the Substitute Hearing Examiner's Decision from a Cold Transcript

The case began on April 11, 1997, when General Motors notified Halleen Chevrolet of its intent to move a competing Chevrolet dealership, Fairchild Chevrolet. The proposed relocation would have decreased the distance between the two Chevrolet dealerships from 12. 5 miles to only 5.2 miles. Pursuant to Ohio Revised Code § 4517.50(A), Halleen timely filed an administrative protest as the proposed relocation was within Halleen's ten-mile Relevant Market Area (RMA) and would significantly decrease Halleen's market share.

The rights of automobile franchisees are protected through federal and individual states' automobile franchise acts, which provide customary and reasonable procedural safeguards for the small businessman. As this Court noted in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 199 S. Ct. 403 (1978):

> The disparity in bargaining power between the automobile manufacturers and their dealers prompted Congress and some States to enact legislation to protect retail car dealers from perceived abuse and oppressive acts by the manufacturers. Among its other safeguards, the **Act protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees** where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest.

(Emphasis added). *Id.* at 101, 407.

Following the federal law and national trend, Ohio has granted broad authority to the Ohio Motor Vehicle Dealers Board to oversee and regulate the retail automotive and truck market. For purposes of these proceedings, the most significant aspect of this legislation is R.C. § 4517.50. This provision declares

that dealerships may **not** be moved to within ten (10) miles of existing dealerships selling the same line unless the Motor Vehicle Dealers Board determines that the manufacturer meets its burden of proof and "good cause" for such relocation. R.C. § 4517.51 further states that:

> In determining whether good cause has been established by the franchisor to establish an additional new motor vehicle dealer or to relocate an existing new motor vehicle dealer as provided in section 4517.50 of the Revised Code, the motor vehicle dealers board shall take into consideration the existing circumstances, including, but not limited to, all of the following:
>
> (A) The effect of an additional or relocated dealer upon the existing new motor vehicle dealer of the same line-make in the relevant market area to be served by the additional franchisee or relocated dealer;
>
> (B) Whether it is injurious or beneficial to the public interest for the dealer to be established or relocated;
>
> (C) Whether the franchisees of the same line-make in the relevant market area are:
>
> > (1) Providing adequate competition and convenient consumer care for the motor vehicles of the same line-make in the relevant market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified sales and service personnel;
> >
> > (2) Providing adequate market penetration and representation.
>
> (D) Whether the franchisor has complied with the requirements of this chapter.

The relocation of a dealership into the vicinity of established franchisees is a serious matter which poses substantial economic risks. Recently, the Third Circuit has reiterated the purpose of the federal and state franchise laws explaining that:

> The ADDCA is a remedial statute enacted to redress the economic imbalance and unequal bargaining power between large automobile manufacturers and local dealerships, protecting dealers from unfair termination and other retaliatory and coercive practices.

Maschio v. Prestige Motors, 37 F.3d 908 (3d Cir. 1994).

As required by R.C. § 4517.57(A), the Ohio Motor Vehicle Dealer Board ("OMVDB") on April 30, 1997, designated attorney Robert Carter as the hearing officer to observe the witnesses, receive oral testimony, and make a recommendation to the Board. (App. H, p. 60a). Ohio Revised Code § 4517.57(A) requires that:

> Subject to sections 119.01 to 119.13 of the Revised Code, the board **shall designate an attorney** at law as a hearing officer, **who shall hear and consider the oral and documented evidence** introduced by the parties and other interested individuals and groups, **and issue his findings and recommendation to the board within thirty days following the close of the hearing**.

Id. (Emphasis added). The mandatory language of "**shall**" in the statutory provisions indicates the legislative intent that the original hearing officer must *hear* the testimony and make a decision after weighing the evidence and evaluating the witnesses' credibility.

The original hearing examiner heard nine (9) days of oral testimony, which concluded on July 16, 1998. He reviewed documents and heard conflicting factual and expert oral testimony. The parties' experts' opinions were *diametrically*

opposed on almost every statutory factor to be weighed and considered under R.C. § 4517.51. (*See* App. B, Common Pleas Decision, p. 44a). According to the statutory provisions, General Motors had the burden to prove "good cause" prior to the relocation. Conflicting expert statistical analyses were introduced through testimony before the original hearing examiner to assist him in weighing the evidence of the statutory factors established by the Ohio legislature in R.C. § 4517.51. For example, the hearing officer must balance and weigh the evidence in order to determine "whether it is injurious or beneficial to the public interest for a dealer to be established or relocated". R.C. § 4517.51(B).

The underlying case and record primarily consisted of live witness testimony on issues that were hotly contested between the parties. The experts for each party squarely contradicted one another. Credibility determinations of fact witnesses and the weighing of the Ohio General Assembly's "public interest" balancing factors enumerated in R.C. § 4517.51 were crucial to the determination of the issues decided by the hearing examiner. A hearing *de novo* should have been conducted by Hearing Examiner James when he was assigned this matter eight (8) months after the conclusion of the original nine (9) day hearing presided over by the first Hearing Examiner.

The raw data in this case was largely unchallenged. Credibility of the expert and lay witnesses, however, was an issue. The methods of analysis and the conclusions drawn from the raw data were a hotly disputed issue. For example, General Motors claimed that "Fairchild would have to sell 675 new units per year to break-even" at the new location. Halleen's expert, however, testified that since 1994 Fairchild never sold 675 new units per year. Halleen explained that Fairchild's lack of advertising, unwillingness to invest in its current building since 1985, and personnel problems also contributed to its decline in car sales. General Motors illogically argued that moving the dealership into the vicinity of its competitor would increase car sales. Halleen's expert concluded from historical examples and

statistical models that total new Chevrolet car sales would not increase. Halleen's expert explained that a "market shift" would occur and that Fairchild would capture sales from Halleen's historical sales area. These are just a few examples highlighting the discrepancies in fact and expert opinion necessitating that the trier of fact observe the character and demeanor of the witnesses and then weigh and balance the evidence.

The Ohio appellate court's decision acknowledged that the hearing examiner was required to weigh evidence in order to reach his decision. The court of appeals repeatedly remarked that the substitute hearing officer was entitled to accept the testimony of General Motors' witnesses over that offered by Halleen (App. A, pp. 7a-9a, 21a-22a). The court of appeals then proclaimed that:

> As to the factors set forth in R.C. 4517.51(A), (B), (C), and (D), *the hearing officer had to weigh this substantial amount of conflicting evidence presented by the parties' expert witnesses*. [Emphasis added]

(App. A, p. 15a). Quite clearly, this case could not be resolved solely through an analysis of the so-called "undisputed data and statistics" (App. A, pp. 7a-9a, 15a, 21a-22a).

Another example of the required balancing, weighing, and credibility determinations was observed by the court of appeals. The court of appeals noted that one of Halleen's key witnesses, Carl Halleen, is related to Charles and Mark Halleen and owns fifty percent (50%) of the Halleen dealership (App. A, p. 17a). The only discernable reason for this remark is to suggest that his "bias" would allow his opinions regarding the potential financial impact on his business to be discarded by the hearing officer. Conversely, the court steadfastly upheld the substitute hearing officer's right to base his decision squarely upon the equally self-serving testimony of Robert Fairchild, one hundred percent (100%) owner of Fairchild Chevrolet, as to his own purported business predicament (App. A, p. 17a). In the conclusion to the opinion, the common pleas judge was praised

for deferring "to the hearing examiner's resolution of the evidentiary conflicts" (App. A, pp. 21a-22a). Given that important credibility determinations were plainly required in order for this dispute to be resolved correctly, it was incumbent upon the hearing officer to, at the very least, observe and listen to the witnesses.

An Ohio's Tenth District Court of Appeals panel previously opined that the exact same competing experts' credibility must be determined by the initial trier of fact (i.e. hearing examiner), not a reviewing court from the "cold transcript". *Joe O'Brien Chevrolet Inc. v. General Motors Corporation* (1977), 118 Ohio App. 3d 470, 485, 693 N.E.2d 317, 327. The *O'Brien* court explained:

> ". . . when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility."

O'Brien quoting *Univ. of Cincinnati v. Conrad*, 63 Ohio St. 2d 108,111, 407 N.E.2d 1265, 1267-1268 (1980).

Although R.C. § 4517.57(A) requires a written recommendation be issued within thirty (30) days, none was ever provided by Hearing Examiner Carter. On March 26, 1999, over *eight (8) months* after the hearing, the OMVDB *sua sponte*, and without any explanation, reassigned the administrative proceeding to a new Hearing Examiner, Larry H. James (App. H).

On April 6, 1999, Halleen timely objected to the proposed reassignment to a subsequent hearing examiner as violating Halleen's procedural due process rights. No reason, justifiable or not, was ever given by the OMVDB and Halleen's objection was ignored by the OMVDB.

On May 17, 1999, the substitute hearing examiner noted petitioners' objection to the proposed transfer and request for a hearing *de novo* (App. G). On June 3, 1999, the substitute hearing examiner overruled petitioners' objections and proceeded as a summary jury trial (App. F).

Over Halleen's repeated objections to proceed as a summary jury trial, with only arguments of counsel, Hearing Examiner James filed his recommendation and findings on October 20, 1999. The recommendation mirrored *verbatim* General Motors proposed findings of fact and conclusions of law. The OMVDB declined to further consider the recommendation and Halleen's October 27, 1999, procedural and Constitutional due process objections. The substitute hearing examiner's proposed recommendation was then approved as the final order of the OMVDB, *without* any review by the OMVDB, pursuant to an automatic adoption process set forth in Revised Code § 4517.58 (App. E).

The OMVDB failed to act on any of Halleen's previous written objections to the second hearing examiner's appointment and summary review. Halleen requested the OMVDB to consider the following: (1) Halleen's Motion for Oral Argument, October 29, 1999; (2) Halleen's Objection to Magistrate's Recommendation, October 27, 1999; (3) Halleen's Objection to Magistrate's June 1, 1999, Entry to Proceed as a Summary Jury Trial, June 2, 1999; (4) Halleen's Objection to Magistrate's Entry to proceed as a Summary Jury Trial, June 2, 1999; (5) Halleen's Objection to Magistrate's Entry to Proceed as a Summary Jury Trial, May 25, 1999; and (6) Halleen's Objection to Notice of Re-Assignment, April 6, 1999. The OMVDB, which was established by statute to act as an appellate authority, neither deliberated nor ruled on any of the above six (6) requests. This inaction exemplifies the lack of due process accorded to Petitioners.

B. The Appellate Proceedings Below

Halleen timely filed an appeal to the Franklin County Court of Common Pleas asserting a denial of Constitutional due process because: (1) the substitute examiners' decision was based on a cold transcript; and (2) the OMVDB refused to review the examiner's factual recommendations. The common pleas trial court determined, as a reviewing appellate court, that irrespective of the witnesses' credibility and demeanor issues, Ohio law does not mandate a hearing examiner to actually "hear" factual testimony in an administrative hearing. (*See* App. B, Trial Court Decision, pp. 29a-33a). Consequently, any administrative agency is permitted to make factual determinations on a "cold record," even where there is conflicting oral, factual, and expert evidence. *Id.*

Ironically, the trial court also found that the board's automatic adoption provision as specified in R.C. § 4517.57(D) is constitutional because the litigant had the opportunity for a "meaningful hearing" and consideration of its claim (App. B, p. 36a). However, no meaningful hearing ever occurred before the hearing examiner who actually made the decision.

The court of appeals compounded the error by failing to recognize and apply the basic Constitutional tenet of American Jurisprudence that the fact finder (i.e. hearing examiner) who heard the evidence during an administrative proceeding must actually review, weigh, and be the sole judge of credibility determinations and conflicting expert opinions (App. A). Further, the court of appeals erroneously ruled that Halleen's Constitutional due process rights were not violated by the procedural irregularities through the OMVDB's *sua sponte* reassignment to a substitute hearing examiner and automatic adoption provision without a *meaningful hearing* (App. A). The court of appeals errantly adopted the same argument created by the trial court (App. A, Appellate Court Decision, pp. 21a-22a).

The Ohio Supreme Court declined to accept jurisdiction on October 24, 2001 (App. C) The Ohio Supreme Court denied petitioners' motion for reconsideration on December 5, 2001 (App. D). Thus, this petition for writ of certiorari to the United States Supreme Court is necessary.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS, OTHER CIRCUIT COURT DECISIONS, AND OTHER STATE SUPREME COURT DECISIONS ON THE ESSENTIAL DUE PROCESS RIGHT OF A CIVIL LITIGANT TO HAVE FACTUAL DETERMINATIONS MADE BY THE TRIER OF FACT WHO OBSERVED THE WITNESSES

"One of the most deeply ingrained principles in Anglo-American jurisprudence **requires** that an official entrusted with finding facts must hear the testimony on which his findings will be based." (emphasis added). *United States v. Raddatz*, 447 U.S. 667, 695, 100 S. Ct. 2406, 2422, 65 L. Ed. 2d 424 (1980) (dissenting opinion). In the instant case, petitioner was denied this basic tenant of American law. The current decision adversely affects every administrative litigant.

Halleen's petition for a writ of certiorari should be granted because the opinions of the Ohio appellate courts contradict the vast majority of federal circuit courts and other highest state courts. Federal courts in the First, Second, Third, Fourth, Fifth, and Eighth Circuits have explicitly stated that a single hearing examiner **cannot** be replaced by a substitute hearing examiner, who does not observe the character and demeanor of the witnesses, where material factual issues are unresolved.

Importantly, the failure of the deciding hearing officer to personally observe the witnesses results in a blatant denial of procedural due process to an administrative litigant. As Justice

Marshall's dissent explained in *United States v. Raddatz*, 447 U.S. 667, 696, 100 S. Ct. 2406, 2423, 65 L. Ed. 2d 424 (1980) "as a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the fact to the official entrusted with judging its accuracy."

The United States Supreme Court has never ruled on an administrative proceeding where the hearing examiner was replaced by the decision maker who did not observe the witnesses. The present case differs from *Raddatz*, a criminal suppression hearing, where the district judge refused to rehear testimony heard by the magistrate. In *Raddatz* this Court determined an independent evaluation of the witness' credibility had already occurred, so a *de novo* evidentiary hearing was not required. In this case, Halleen never had a fact finder who observed the witnesses make an evaluation of credibility.

The underlying premise of administrative proceedings is the same as in all American judicial tribunals: **Factual determinations are made by the trier of fact.** The words spoken by a witness are only part of the information the fact finder, whether a jury, judge, or other designated officer, must consider in discharging the duty of resolving factual disputes. The federal circuit decisions rely upon the Administrative Procedure Act provision which requires that the same officer who presides over the receipt of evidence shall make the recommended decision.

Supreme Court Decisions

This Court recognizes the principle that "[t]he one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481, 56 S. Ct. 906, 912, 80 L. Ed. 1288 (1936). In *Morgan* this High Court found that a full hearing was required prior to fixing the price rates for stockyard services. The Court stated:

> The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided

> by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. **If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given**.

Id. at 298 U.S. 480, 56 S. Ct. 911. (Emphasis added). Even though this Court has defined "hearing" more than sixty (60) years ago, the federal circuit courts have made conflicting rulings on the issue of due process afforded through a substitute hearing examiner.

This Court outlined the nature and rationale underlying an original fact finder's duty and the limited standard of review of appellate courts in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985). There, this Court explained that "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.* at 574-575; *see also United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952) ("Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded.").

When determining whether due process has been denied, this Court balances three factors:

> "[W]hat process is due" turns on the balancing of three factors: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the

> function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). First, the private interest affected in the present case would result in severe financial loss to Halleen by eroding its current local automobile sales market. Second, the probability of reduced sales to Halleen is great. The procedural safeguards to eliminate this flaw is to simply mandate that a substitute hearing examiner actually "hear" the testimony before issuing a recommendation. Lastly, the benefit gained to all administrative litigants experiencing this due process denial would be great, compared to the minimal additional cost of holding a *de novo* hearing where the first hearing examiner fails to reach a decision.

In *New Motor Vehicle Board v. Fox*, this Court explained that procedural safeguards are necessary to protect automobile dealers against the large automobile manufacturers with their superior economic strength. Similar to the Ohio legislature, the California:

> Legislature was empowered to subordinate manufacturers' franchise rights to their franchisees' conflicting rights where necessary to prevent unfair or oppressive trade practices, and also to protect franchisees' conflicting rights through **customary and reasonable procedural safeguards**, i.e. by providing existing dealers with notice and **an opportunity to be heard** by an impartial tribunal (the Board) before their franchisor is permitted to inflict upon them grievous loss.

(Emphasis added). *Id.* at 97, 405. In the present, case Halleen was not provided these customary and reasonable procedural safeguards as no hearing officer or decisionmaker ever heard the witnesses and the OMVDB never deliberated on the case.

Circuit Court Decisions

The First, Second, Third, Fourth, Fifth, Sixth and Eighth Circuit Courts have all held and explained a civil litigant's due process rights must remain protected, even before an administrative tribunal.

The seminal federal circuit case on the issue of substitute hearing examiners is the Eighth Circuit decision of *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d 106 (8th Cir. 1954). In *Gamble-Skogmo*, the Eighth Circuit held that where a substitute hearing examiner based his decision, in material measure, upon a credibility evaluation of the evidence which had been heard by the original hearing examiner, an order based on that decision was invalid. The Federal Trade Commission brought charges alleging that the corporation imposed agreements upon its retailers that they not carry competing products. *Id.* at 109. The Commission appointed a trial examiner before whom all of the evidence was taken. The trial examiner was forced into retirement pursuant to 5 U.S.C.A. § 715. *Id.* The Commission denied requests by the corporation to have the trial examiner complete his review of the case or in the alternative to strike the evidence in the record and require the substitute trial examiner to engage in a *de novo* hearing in order that he would have the opportunity to see and hear the numerous opposing witnesses involved and be able to evaluate their credibility. *Id.* at 110-11.

The Eighth Circuit federal court **invalidated** the substitute examiner's decision. The Circuit Court explained:

> [W]here substitute examiner based his decision, in material measure, upon credibility evaluation of evidence which had been heard by original examiner who was unavailable to make findings and decision, order based on such decision was invalid, irrespective of whether there was evidence sufficient, ignoring all issues of credibility, to support the decision.

Id. at 106.

Similar to the present case, the Eighth Circuit found that the statute in *Gamble-Skogmo* required that the officer who presides at the administrative hearings **shall** make the initial decision. Congress intended to protect the Constitutional guarantee that the trier of fact who hears and receives the evidence makes the factual determination after weighing the evidence. *Id.* at 114. The court explained that the evaluation and credibility determination of the witnesses by the hearing officer is a fundamental procedural right that cannot have any exceptions, unless statutory language so compels. *Id.*

The Fifth Circuit also invalidated a substitute hearing examiner's decision from a "cold transcript" to avoid a miscarriage of justice in *Pigrenet v. Boland Marine & Manufacturing Co.*, 631 F.2d 1190 (5th Cir., 1980). In that workers' compensation hearing, the court found that "the failure by the substituted administrative law judge to conduct a *de novo* hearing of the evidence constitutes manifest injustice." *Id.* at 1192.

The Fifth Circuit court recognized the wisdom and precedent established by the Second, Fourth, and Eighth circuits. The Fifth Circuit court held: "where credibility of the witness is crucial to resolving a factual dispute, a *substituted fact finder must engage in a de novo hearing of the evidence*." *Id.* (Emphasis added). The Fifth Circuit stated:

> The Second, Fourth, and Eighth Circuits have implied that where credibility of the witness is crucial to resolving a factual dispute, a substituted fact finder must engage in a *de novo* hearing of the evidence. *Appalachian Power Company v. Federal Power Commission*, 328 F.2d 237 (4th Cir.), cert. denied, 379 U.S. 829, 85 S.Ct. 59, 13 L.Ed.2d 38 (1964); *Art National Manufacturers Distributing Co. v. Federal Trade Commission*, 298 F.2d 476 (2nd Cir.), cert. denied 370 U.S. 939, 82 S.Ct. 1588, 8 L.Ed.2d 808 (1962); *Gamble-Skogmo, Inc. v. Federal Trade*

> *Commission*, 211 F.2d 106 (8th Cir. 1954). Thus, we find in this instance that **the failure by the substituted administrative law judge to conduct a *de novo* hearing of the evidence constitutes manifest injustice**.

Id. at 1192. (emphasis added). Similarly, Halleen must be allowed to have its case heard *de novo* by a hearing officer to avoid a miscarriage of justice.

The Fifth Circuit cited a Fourth Circuit case, *Appalachian Power v. Federal Power Commission*, *supra*, to strengthen its position. The Fourth Circuit explained that: "[w]here original trial examiner hears testimony and the demeanor of witnesses is an important factor, the substitution of a new trial examiner might be improper." *Id.* at 240. While the Fourth Circuit stated its position on the procedural due process issue, the issue was not a factor in *Appalachian Power* as the substituted examiner heard all the evidence.

The Second Circuit ruled that a substitute hearing examiner can issue a recommendation, without hearing the witnesses, **if the administrative board deliberates on the recommendation**. The Second Circuit addressed the administrative law and procedural issue in *Art National Manufacturers Distributing Co. v. Federal Trade Commission*, 298 F.2d 476 (2d Cir.), *cert. denied*, 370 U.S. 939, 82 S. Ct. 1588, 8 L. Ed. 2d 808 (1962). The Second Circuit upheld the Federal Trade Commission's finding where the first hearing examiner died because "the Commission made its findings on 'uncontroverted' evidence not involving credibility. Moreover, the substitute examiner offered petitioners the opportunity to recall any witnesses heard by the first examiner." *Id.* at 477. However, in the present case the factual evidence was: (1) clearly contradicted; (2) the experts were diametrically opposed on factual and expert opinions; (3) the findings required credibility determinations; and (4) the substitute hearing examiner refused Halleen's request to hold a *de novo* hearing with live witnesses.

Three years later the Second Circuit issued a surprising ruling that the hearing examiner need not see the witnesses, even where credibility is an issue. This ruling clearly represents a minority position of the United States circuit courts. In *Utica Mutual Insurance Co. v. Vincent*, 375 F.2d 129, 132 (CA2) (Friendly, J.), *cert. denied*, 389 U.S. 839, 88 S. Ct. 63, 19 L. Ed. 2d 102 (1967), the court found that the due process clause does not require the decider to see the witnesses, even where issues of credibility exist. This decision violates civil litigants' due process rights.

The Third Circuit also stated that due process is not violated in an administrative hearing where there are issues of credibility and the trial examiner does not observe the demeanor of the witnesses. *National Labor Relations Board v. Stocker Mfg. Co.*, 185 F.2d 451 (1950). In *NLRB v. Stocker*, the trial examiner died before preparing a report and the substitute examiner issued his recommendations and report to the Board. IMPORTANTLY, however, in *Stocker* the Court noted that the Board "makes an original disposition of the issues contested by the respondent on the basis of its own study of the record without any obligation to follow the intermediate report." *Id.* at 452. The present case is clearly distinguishable since the OMVDB **never** deliberated or considered the record. Through the Board's inaction, it adopted the recommendation of the substitute hearing examiner.

The Sixth Circuit also acknowledges the importance of the original hearing examiner to hear the evidence presented. In *Pfizer v. FTC*, 401 F.2d 574 (6th Cir., 1968), the Sixth Circuit held that "Questions of credibility and testimonial weight are issues upon which the courts do not second guess the hearing examiner." Thus, a civil litigant is entitled to have the evidence reviewed by the original hearing examiner and not second guessed by an appellate court who did not observe the witnesses.

Lastly, the First Circuit cited with approval the Eighth Circuit's holding of *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d 106 (8th Cir. 1954) and the Federal Administrative Procedure Act.

In *New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Commission*, 582 F.2d 87 (1st Cir. 1978), the First Circuit Court cited the Administrative Procedure Act, 5 U.S.C. § 554(d) requiring that "The employee who presides at the reception of evidence . . . shall make the recommended decision or initial decision . . . , unless he becomes unavailable to the agency." The First Circuit explained that "The APA expresses a strong preference for having decisions made by someone who has heard the evidence presented." *New England Coalition*, 582 F.2d at 99. The First Circuit opined that "The legislative history indicates, the presiding employee's opinion is of special consequence 'to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing'." *New England Coalition*, 582 F.2d at 99 citing to *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d at 115. Thus, because Ohio Revised Code § 4517.51 requires balancing public interest, weighing conflicting expert witness reports, and the determination of credibility of witnesses' demeanor and conduct, Halleen was entitled to have the hearing examiner who heard the evidence make the determinations in order to protect a civil litigant's constitutional due process rights.

Therefore, this Court should accept Halleen's writ of *certiorari* in order to confirm the First, Second, Third, Fourth, Fifth, Sixth, and Eighth Circuit Court decisions protecting a civil litigant's due process rights. This Court has never squarely addressed the issue of a substitute hearing examiner making credibility determinations, weighing conflicting expert opinions, and balancing public interest factors. It is necessary for this Court to set forth a definitive holding and explanation in order to preserve the integrity of the American judicial system.

State Supreme Court Decisions

The vast majority of the highest state courts have held that in an administrative proceeding a substitute hearing examiner must hold a *de novo* hearing to ensure procedural due process. State supreme courts in Alaska, Arizona, District of Columbia, Indiana, Maryland, Michigan, New Hampshire, Vermont, Virginia, and Wisconsin are but a few states which subscribe to this majority viewpoint.

The present case is most similar to *Shawley v. Industrial Commission*, 16 Wis. 2d 535, 114 N.W.2d 872 (1962). In *Shawley*, the Wisconsin Supreme Court held that a replacement hearing examiner must hold a *de novo* hearing when the replacement examiner had not personally viewed the witnesses giving testimony and a credibility evaluation is relevant to the case. In *Shawley*, two hearings were held before the original examiner and the third before his replacement. The court found that due process had been denied because the second hearing examiner could not reproduce the personal impressions of the witnesses made on the first examiner. *Id.* at 114 N.W.2d 872, 875 - 76.

In *Petition of Ruediger Grimm, Ph.D.*, 138 N.H. 42, 635 A.2d 456 (1993), the New Hampshire Supreme Court held that "due process requires all panel members deciding the case to be in attendance for all of the parties' testimony, plus any other testimony on the issue of credibility, in order to effectively assess the issue of credibility." *Id.* at 47, 459. In *Grimm*, the State Board of Examiners voted to revoke the psychology license of Grimm for his alleged sexual conduct after a hearing in which five of the seven members observed testimony. The New Hampshire Supreme Court vacated the ruling and remanded for a full rehearing with all the Board's members physically present.

The Supreme Court of Alaska held that due process in an administrative proceeding is denied where no decisionmaker is present for the testimony. *Schmidt v. Beeson Plumbing and*

Heating, Inc., 869 P.2d 1170 (1994). Referring to the Wisconsin Supreme Court case of Shawley, the Alaska court stated:

> Although ideally all decision makers who weigh evidence should be present to observe witness testimony, courts accept that the reality of administrative proceedings often makes that impossible. As noted above, courts generally will not overturn the decisions of tribunals, even when not every member was present at all times, as long as the court believes the entire tribunal considered the evidence in some form, and **a quorum was present to observe all testimony**. This is different from situations like *Shawley's* where the decision making apparatus contains no one who observed the witnesses testifying.

(Emphasis added). *Id.* at 1178. In *Schmidt* the Alaska court allowed the replacement of a third hearing officer in a three panel commission since two members heard the original testimony. However, in the present case **the sole hearing officer** making the decision did not observe the demeanor of the witnesses.

The Vermont Supreme Court established an even higher level of due process for a commission in an administrative proceeding. In *In Re David Villeneuve*, 167 Vt. 450, 709 A.2d 1067 (1998) the Vermont Supreme Court held that:

> Due process does require the decision maker's personal presence at evidentiary hearings where the agency involved "elects to make factual determinations as a hearing panel and the record does not provide a reasonable basis for evaluating the kind of testimony in questions." *In re Grimm* (1993), 138 N.H. 42, 635 A.2d 456, 459.

Id. at 455, 1070. The court found that even where three of five members of a commission were present to hear evidence in a

lemon law automobile hearing, the lack of due process required a *de novo* hearing of the evidence.

In *Stevens Chevrolet, Inc. v. Commission on Human Rights*, 498 A.2d 546 (D.C. Ct. App. 1985), the Court of Appeals for the District of Columbia held that an employer was entitled to a new hearing where the original hearing examiner had retired **without** reporting his findings to the Commission. The court held that an administrative tribunal is required to hold a new hearing when a hearing examiner becomes unavailable, unless the agency can demonstrate that the credibility of witnesses plays **no** part in the agency's determination. *Id.* at 550. The court stated that where determinations of credibility are required they must be made before an agency may decide a case.

> If, in arriving at some material fact or facts, either as a matter of direct determination or predicated inference, it is necessary to choose, or choice is undertaken to be made, on a personal basis, between things, which some witnesses assert and some witnesses deny, neither of which is inherently incredible, and such a choice is acceptingly or rejectingly capable of affecting the result, the proper credibility evaluation is inescapably involved as a salient processive factor.

Id. The *Stevens* court found that "[w]hen the examiner has become unavailable, courts have uniformly required a hearing *de novo* whenever the agency's decision depends to any extent on the credibility of witnesses." *Id* at 549.

Examples of other state court decisions protecting civil litigants' due process rights during an administrative proceeding are as follows: *Virginia Real Estate Board v. Kline*, 17 Va. App. 173, 435 S.E.2d 596 (Va. Ct. App. 1993) (death of hearing officer during recess of formal administrative hearing required that the case be reheard *de novo* by a new hearing officer); *Citizens for Rewastico Creek v. Commissioners of Hebron*, 67 Md. App. 466, 508 A.2d 493 (1986) ("we look to whether the demeanor

of the witnesses and their manner of testifying would constitute a 'material factor' in reaching the proposed decision"); *Adams v. Ind. Commission of Arizona*, 147 Ariz. 418, 710 P.2d 1073 (1987) (award to claimant cannot be reversed on review by substituted administrative law judge who did not personally observe the claimant testify where claimant's credibility was crucial to the case); *Andrews v. Michigan Dep't of Labor*, 407 Mich. 890, 284 N.W.2d 126 (1979) (reverse and remanding the matter to the Civil Service Commission, because hearing examiner should not have rendered a decision in this cause when he did not preside at the hearing. Specifically, the court held that the hearing examiner neither saw nor heard the witnesses and the demeanor of the witnesses was significant to the outcome.); and *Addison v. Review Board of the Indiana Employment Security Division*, 397 N.E.2d 1037 (Indiana, 1979) (employee not afforded due process and denied a meaningful credibility determination by administrative fact-finder where one referee heard employee's evidence, second referee heard employer's evidence, and first referee issued findings of fact and conclusions).

Thus, this Court should allow the writ of *certiorari* in order to protect civil litigants' due process rights as explained by various state highest court decisions.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING THAT AUTOMATIC ADOPTION BY AN ADMINISTRATIVE BOARD VIOLATES THE ESSENTIAL DUE PROCESS RIGHT OF A CIVIL LITIGANT IF A MEANINGFUL HEARING WAS NOT HELD

The process of allowing a hearing examiner to make a decision without observing any testimony of the witnesses combined with the OMVDB's automatic adoption provision created a blatant miscarriage of procedural due process to petitioner Halleen. As explained by this Court:

> But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determination must consider and appraise the evidence which justifies them.

Morgan v. United States, 298 U.S. 468, 481-82, 56 S. Ct. 906, 912, 80 L. Ed. 1288 (1936).

The relevant statute in this case, R.C. Chapter 4517, does not set forth a procedure for the reassignment of hearing examiners after testimony and evidence have been presented to the trier of fact. On March 26, 1999, over eight (8) months after hearing, the OMVDB *sua sponte* reassigned the administrative proceeding to a substitute hearing examiner without any explanation. Petitioners repeatedly objected to the procedural irregularity and failure to explain the reassignment. No response was ever received from the OMVDB.

The subsequent inaction by the OMVDB and its decision where it "declined to further deliberate on this matter" deprived Halleen of a decision on the merits and denied Halleen its due process rights of a meaningful hearing (App. E). The OMVDB

adopted by inaction an order by a substitute hearing examiner who never had the opportunity to observe the demeanor of the witnesses and determine their credibility.

State court decisions have also found that an administrative board, even if delegating the initial proceeding to a hearing examiner, must be the ultimate fact finder and properly perform its duties by reviewing recommendations. The New Hampshire Supreme Court has recognized the general rule that "All members of the hearing panel acting as fact finders must be present for testimony." *Appeal of Stephen Dell, M.D.*, 140 N.H. 484 at 496, 668 A.2d 1024 at 1033 (1995). The Supreme Court of Pennsylvania similarly found that the Board is the ultimate finder of fact in administrative tribunals involving unemployment compensation claims. *Peak v. Commonwealth of Pennsylvania*, 509 Pa. 267, 501 A.2d 1383 (1984). A Washington court explained that an administrative "Board alone has the 'duties of interpreting the testimony and making the final decision and order on appeal cases.' RCW 51.52.020." *Rosales v. Dept. of Labor and Industries*, 40 Wash. App. 712, 700 P.2d 748 (1985).

Thus, if disputed factual issues and credibility determinations must be made, the administrative board must observe the witnesses before making the agency's final determination.

Respondents' Cases Support Petitioners' Writ of Certiorari

Respondents have cited various cases in their lower court briefs. Each one, when analyzed in its entirety, strengthens petitioners' position that they were denied due process by: (1) a subsequent hearing examiner's failure to conduct a *de novo* hearing; and (2) that the administrative board's failure to independently examine the record denies a civil litigant his due process.

The majority of Respondents' cases can be grouped into three (3) categories: (1) a *quorum* of hearing officers must be

present to hear initial testimony; (2) the Board must actively review and then issue the agency's order; or (3) a purely legal question or zero factual evidence exists in the original hearing examiner's procedures.

The *quorum* category holds that one of the decision makers may be replaced, if the remaining and a majority of the decision makers heard the testimony. The Supreme Courts of Alaska, Connecticut, and New Hampshire held that a *quorum* of members must be present in an administrative hearing in order to ensure procedural due process. *Lewis v. Statewide Grievance Committee*, 235 Conn. 693, 669 A.2d 1202 (1996); *Schmidt v. Beeson Plumbing and Heating, Inc.*, 869 P.2d 1170 (1994). In both cases a substitute examiner was allowed to replace a third examiner where the other two heard all of the original testimony. In *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 490 A.2d 1329 (1985), the majority of the commission's members heard the original testimony and only one member recused himself and was replaced.

The other two (2) categories involving an active Board review or a proceeding without factual issues or involving purely legal questions are intertwined and will be reviewed together.

In *Appeal of Dell* (1995), 140 N.H. 484, 668 A.2d 1024, the New Hampshire Supreme Court held an administrative board can issue a decision without hearing the live witnesses. Where any factual discrepancies exist, however, the hearing examiners **must** be present for the testimony. The Supreme Court of New Hampshire explained its position as follows:

> The general rule in an administrative proceeding is that the board may act on a written record of testimony by witnesses whom its members have not personally seen or heard. *Smith*, 139 N.H. at 303, 652 A.2d at 157; *Grimm*, 138 N.H. at 46, 635 A.2d at 459. "This general rule may apply even in a case where experts are in conflict, when the choice of whom to believe is a function of logical analysis,

> credentials, data base, and other factors readily discernible to one who reads the record." *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 716, 490 A.2d 1329, 1335 (1984) (quotations omitted). However, this "procedure is not proper where the board elects to make factual determinations as a hearing panel and . . . disposition turns on the credibility of the witnesses' testimony." *Smith*, 139 N.H. at 303, 652 A.2d at 157 (quotations omitted). In such a case, we have held: "All members of the hearing panel acting as fact finders must be present for testimony . . . that concerns the disputed factual basis of a complaint where determination of those disputed facts rests, in some material part, on the fact finder's assessment of their credibility, as shown by their demeanor or conduct at the hearing." *Id.*; *see New England Coalition v. U.S. Nuclear, Etc.*, 582 F.2d 87, 100 (1st Cir. 1978).

Id., 140 N.H. at 495-196.

Furthermore, the New Hampshire Supreme Court reiterated that an administrative board must independently examine the record, not merely serve as a "rubber stamp". "We hold, however, that where an administrative agency rejects an advisory decision, it must adequately explain the grounds for such different decision, and fully and particularly set out the agency's decision based upon an independent examination of the record." *Id.* at 493.

Seacoast is also distinguishable from the present case, as the testimony was uncontroverted. Some courts have held that a substitute hearing examiner need not hear all the testimony where evidence is non-conflicting. In *Seacoast*, the court stated that sometimes "the record does not provide a reasonable basis for evaluating the kind of testimony in question. Then, a given administrative official's personal observation is necessary to evaluate testimony before an administrative tribunal.

See Opinion of the Justices, 117 N.H. 386, 373 A.2d 642 at p. 422 (1977)." Furthermore, the court determined that the choice of which witnesses to believe was a "function of logical analysis, credentials, data base, and other factors." *Id.* at 716, 1335.

In *Rosales v. Department of Labor*, 40 Wash. App. 712, 700 P.2d 748 (1985), the Washington court of appeals held that when a substitute hearing examiner heard the Department's evidence and plaintiff's rebuttal, due process was not denied. More importantly, the court stated that "[t]he Board alone has the 'duties of interpreting the testimony and making the final decision and order on appeal cases.'"

Respondents' reliance upon *Peak v. Commonwealth of Pennsylvania*, 509 Pa. 267, 501 A.2d 1383 (1984) is misplaced. In *Peak*, the board reviewed and reversed the decision of the hearing examiner, who heard the evidence. The court held that the Board is the ultimate finder of fact, and therefore, can overturn the referee's decision that an employee had not engaged in willful misconduct. In the present case, the hearing examiner never heard the evidence, and the OMVDB never examined the case.

Likewise, the Respondents' reliance upon *SBC Communications v. FCC*, 5 F.3d 1484, 312 U.S. App. D.C. 414 (1995) is misplaced. SBC never made a claim of denial of due process, rather it sought to force an evidentiary hearing on millions of pages of evidence in the mega-merger telecommunications case. The Washington D.C. appellate court stated that the FCC was not required to hold a full evidentiary hearing prior to transferring radio licenses and other related authorizations, *Id.* at 1496, 426, unlike the statutory requirement of hearing in this case.

In *University Community Hospital v. Department of Health and Rehabilitative Services*, 555 So. 2d 922 (1990), the Florida appellate court followed the *Gamble-Skogmo* case law "which held that a substitute hearing officer is required to conduct a new hearing when an evaluation of a witness' credibility is

necessary." *Id.* at 924. Unlike the present case, however, in *University* the court held that state law created clear statutory authority to replace a hearing officer, and a hearing *de novo* was never requested by plaintiff. The petitioners herein requested a hearing *de novo and* there is no state law authorizing replacement of a hearing officer.

The respondents and the Ohio court of appeals attempt to rely upon *per curiam* decisions of *Laughlin v. PUCO* (1966), 6 Ohio St. 2d 110, 216 N.E.2d 60, and *Ritchie Photographic v. Limbach* (1994), 71 Ohio St. 3d 440, 644 N.E.2d 312. However, *Laughlin* and *Ritchie Photographic* do not apply because credibility determinations were **not** made from a cold record.

Laughlin was based **entirely upon a question of law,** i.e. whether the PUCO had the legal authority to allow the utility-applicant to abandon the gas service line at issue. Because the report and recommendation of the attorney examiner in *Laughlin* did **not** involve the weight of the evidence or the credibility of the witnesses, the files, transcripts, and exhibits contained all of the information needed by the new examiner to arrive at a legal conclusion and determination as a matter of law. A plain reading of the opinion in *Laughlin* reveals that demeanor or credibility issues were **not** part of the determination made by the Hearing Examiner that prepared the findings and legal recommendations.

Likewise, the court of appeals' reliance on *Ritchie Photographic* is misplaced. In *Ritchie Photographic*, the taxpayer had the **opportunity** to present evidence to support his claim first to the tax commissioner, and then to the BTA and its hearing examiner. The record before the Supreme Court did **not contain any evidence** to support the taxpayer's contention. The Supreme Court found that Ritchie presented "**no evidence** concerning the details of the hearing to support its allegations." (emphasis added). *Id.* at 441, 313. The Supreme Court in *Ritchie* did not address the issue of substitution of hearing examiners where credibility of witnesses was at issue. The record in *Ritchie*

was found by the Supreme Court to be **devoid of any facts**. Thus, a weighing of evidence and credibility of witnesses **never** occurred.

CONCLUSION

This case presents a question of exceptional importance to federal and state civil litigants in administrative proceedings, trials before magistrates, and trials to a judge without a jury. All civil litigants are entitled to their constitutional Fifth and Fourteenth Amendments' due process rights. If the opinion below is allowed to stand, the petitioners and all future civil litigants will be denied due process and will forever suffer the consequences of a decision which directly contravenes the basic tenet of American jurisprudence. However, by granting Halleen's Petition for a Writ of Certiorari, this Court can correct the Ohio Appellate Court's decision, which defies the First, Second, Third, Fourth, Fifth, Sixth and Eighth Circuit Court decisions and numerous other state Supreme Court decisions (Alaska, Arizona, District of Columbia, Indiana, Maryland, Michigan, New Hampshire, Vermont, Virginia, and Wisconsin).

Accordingly, Halleen respectfully requests that their Petition for a Writ of Certiorari be granted in order to reaffirm the paramount due process rights civil litigants are entitled. All civil litigants are entitled to have the fact finder actually observe witnesses before making credibility determinations. Furthermore, an administrative agency board is automatic adoption, without reviewing the substitute hearing examiner's recommendation from a cold transcript, is a violation of a civil litigant's due process rights which needs to be corrected.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT DATED AND FILED JUNE 28, 2001

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

No. 00AP-1454

(REGULAR CALENDAR)

Halleen Chevrolet, Inc. et al.,

Appellants-Appellants,

v.

General Motors Corporation et al.,

Appellees-Appellees.

OPINION

Rendered on June 28, 2001

* * *

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

Appellants, Halleen Chevrolet, Inc., and Charles Halleen (collectively referred to as "Halleen"), appeal the judgment of the Franklin County Court of Common Pleas affirming the order

of the Motor Vehicle Dealers Board of Ohio ("MVDB" or "the board") to permit appellees, General Motors Corporation ("GM"), to relocate Fairchild Chevrolet ("Fairchild").

Before a franchisor such as GM may relocate an existing new automobile dealer, it first must give written notice of such intent to each franchisee of the same line-make of vehicle in the relevant market area ("RMA"), an area within a ten-mile radius from the site of the proposed relocated existing dealer. On January 23, 1997, GM gave Halleen and other RMA dealers Notice of Intent to Relocate Fairchild from Detroit Road in Lakewood, Ohio, to the intersection of Detroit and Columbia Roads in Westlake, Ohio. Halleen filed a protest, pursuant to R.C. 4517.50(A).

On July 6, 1998, a hearing commenced before a hearing examiner for the MVDB. Voluminous evidence was presented over the course of the ten-day trial. James A. Anderson testified as an expert witness on behalf of GM. Halleen presented the testimony of expert witnesses Professors John Matthews and Norman Krumholz. Several other lay witnesses testified. After eight months, the original hearing examiner failed to issue a recommendation and the MVDB reassigned the case to another hearing examiner over the objection of Halleen.

A one-day hearing was held before the second hearing examiner, at which counsel for the respective parties presented arguments and the examiner inspected the dealership sites. On October 20, 1999, the hearing examiner issued a recommendation, including findings of fact and conclusions of law, in which he determined that good cause existed to permit Fairchild to relocate. Halleen filed

objections to the hearing examiner's decision, but the MVDB declined to further consider the matter and adopted and approved the hearing examiner's decision.

On December 8, 1999, Halleen appealed to the Franklin County Court of Common Pleas asserting five assignments of error. On December 5, 2000, the common pleas court found that there was reliable, probative, and substantial evidence to support the decision of the MVDB and affirmed the MVDB's decision. Halleen appeals this judgment, asserting the following six assignments of error:

> Assignment of Error No. I: The Board's *sua sponte* reassignment of Hearing Examiners Without any Explanation and Over Halleens' Objections Violates Appellants' Due Process Rights.
>
> Assignment of Error No. II: Halleen was Denied its Constitutionally Protected Right of Due Process when the Hearing Examiner Proceeded to Make a Recommendation *Without* a Hearing or Review of the Conflicting Oral Expert Evidence.
>
> Assignment of Error No. III: Halleen was Denied its Constitutionally Protected Rights of Due Process when the Ohio Motor Vehicle Dealers Board Failed to Deliberate or Review the Hearing Examiner's Proposed Findings.
>
> Assignment of Error No. IV: The Hearing Examiner's Recommendation is Contrary to the Ohio Motor Vehicle Dealer Board and Other States' Public Policy.

Appendix A

> Assignment of Error No. V: The Hearing Examiner's Recommendations Failed to Apply the Relevant Market Area Analysis as Required by R.C. §§ 4517.51 and 4517.01(DD).
>
> Assignment of Error No. VI: The Hearing Examiner's Adoption *in toto* of GM's Proposed Findings of Fact and Conclusions of Law was not Supported by Reliable, Probative and Substantial Evidence and in Accordance with Law.

The standard of review for the court of common pleas in administrative matters is given in R.C. 119.12, which states in part:

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

The standard of review for appellate courts is whether the common pleas court abused its discretion in finding that the administrative order was or was not supported by reliable, probative, and substantial evidence. *Crowe v. State Bd. of Edn.* (Oct. 26, 1999), Franklin App. No. 99AP-78, unreported, quoting *Samson v. State Bd. of Edn.* (Aug. 13, 1998), Franklin App. No. 97APE12-1702, unreported. Further:

Appendix A

> In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. An abuse of discretion *** implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *** Absent an abuse of discretion on the part of the trial court, a court of appeals must affirm the trial court's judgment. ***
>
> The fact that the court of appeals *** might have arrived at a different conclusion than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707, quoting *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260-261. (Citations omitted.)

Having set forth the appropriate standard of review, we now address Halleen's assignments of error. Halleen asserts in its first assignment of error that the MVDB's *sua sponte* reassignment of a new hearing examiner, after the hearing and without any explanation, violated Halleen's due process rights. However, this argument regarding the method

of transfer was raised neither in the objections to the MVDB nor the appeal to the common pleas court, and the trial court did not address it. Halleen's failure to raise such argument before the common pleas court and administrative agency constitutes a waiver of his right to assert it for the first time on appeal to this court. *See State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d. 276, 278; *Morgan v. Girard City School Dist. Bd. of Edn.* (1993), 90 Ohio App.3d 627, 631; *D & D Investment v. Franklin Cty. Bd. of Zoning Appeals* (Dec. 29, 1998), Franklin App. No. 97APD11-1479, unreported. Accordingly, Halleen's first assignment of error is overruled.

Halleen argues in its second assignment of error that the MVDB denied it due process when the second hearing examiner proceeded to make a recommendation without a hearing or a review of the conflicting oral expert evidence. The trial court found the substitution of hearing examiners did not violate any due process or equal protection rights, citing several cases, including *Laughlin v. Pub. Util. Comm.* (1996), 6 Ohio St.2d 110, and *Ritchie Photographic v. Limbach* (1994), 71 Ohio St.3d 440. In *Laughlin*, the Ohio Supreme Court found it was not essential that a person who hears the evidence in an administrative proceeding also prepares the findings and recommendations if that same person reviews and examines the record of the proceeding. In *Ritchie*, citing *Laughlin*, the Ohio Supreme Court also found the administrative board did not deny the parties due process by replacing the attorney-examiner who had conducted the evidentiary hearing with another attorney-examiner who made a determination based upon a "cold record."

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Halleen contends that *Laughlin* and *Ritchie* are distinguishable from the present case because neither involved disputes as to the credibility of witnesses and both were based entirely upon a question of law. However, neither *Laughlin* nor *Ritchie* specifically limited their respective holdings to situations where only legal questions are involved, or where credibility is not at issue.

Even if Halleen's view of the underlying circumstances in *Laughlin* and *Ritchie* were true, we do not find the present case distinguishable from those cases. In support of its contention that the expert witnesses' credibility was at issue in the present case, Halleen cites the common pleas court's statement that the hearing examiner "weighed the voluminous evidence" and "had to weigh a substantial amount of conflicting evidence presented primarily through the parties' expert witnesses." Halleen also cites the common pleas court's statement that the parties' experts disagreed on almost every one of the non-exclusive statutory factors. These three citations to the trial court's decision are the only argument put forth by Halleen to demonstrate that credibility was at issue.

However, the statements by the common pleas court regarding the "weighing" of evidence only points out the existence of conflicting evidence and does not comment on or acknowledge any credibility issues. That the experts disagreed on nearly all of the statutory factors also does not point to any issues of credibility. To the contrary, the hearing before the hearing examiner consisted largely of undisputed data and statistics and each expert's analysis and interpretation of such data. We agree with GM's view that this is not a case where one witness was "lying" and one was

being "truthful," which would require the weighing of witness demeanor and veracity. Apart from the citations to the common pleas court's decision, Halleen fails to point to any specific instances in the record where witness credibility was at issue. The second hearing examiner agreed that he would hear any additional evidence to resolve questions of demeanor or honesty, but after reviewing the evidentiary record, he found that such was not necessary.

This court addressed the same issue raised in this assignment of error in *In re Christian Care Home of Cincinnati, Inc.* (1991), 74 Ohio App.3d 453 and *Kremer v. State Med. Bd.* (1996), Franklin App. No. 95APE09-1247, unreported. The common pleas court in the present case cited both favorably and analyzed our holding in both cases. Although Halleen failed to address these two cases in its merit brief, it did mention them in its reply brief, but only to state that these cases were distinguishable because they also did not involve determinations of demeanor and credibility. However, as with *Laughlin* and *Ritchie*, neither *Kremer* nor *Christian Care* limited their holdings to cases involving only questions of law. Indeed, in *Christian Care*, Christian Care specifically argued that upon remand, the original hearing examiner should have been appointed to consider additional testimony and a modified certificate of need application because only the initial examiner had the opportunity to observe the demeanor of the witnesses. However, we found in *Christian Care* that the appointment of a new hearing examiner met due process requirements even though the new hearing examiner did not observe the witnesses and issued recommendations based only on a review and analysis of the record. We find both *Kremer* and *Christian Care* persuasive.

Halleen points to cases from myriad other jurisdictions outside of Ohio for several related propositions, but it fails to cite any Ohio law to support these same propositions. Given our analysis above, the cases on point from the Ohio Supreme Court and this court, and Halleen's failure to point to any persuasive Ohio law to the contrary, we find these determinations by other jurisdictions to be unpersuasive.

Halleen also points to R.C. 4517.57(A) and 119.09 to support its argument that the same hearing examiner who conducts the hearing must also issue the findings and recommendations to the board. We disagree. R.C. 4517.57(A) requires that the board appoint a hearing officer to hear and consider the oral and documented evidence and issue findings and recommendations to the board. As the trial court similarly noted, we read the term "hearing officer" as used in this provision, to refer to the generic legal capacity or title of the position, rather than as a requirement that the hearing officer be one person or a specific individual. If the legislature had intended this provision to require the specific limitation propounded by Halleen, it could have simply stated so. Likewise, R.C. 119.09 similarly states that the administrative agency may appoint an examiner to conduct a hearing, and the examiner shall submit findings of fact, conclusions of law, and make recommendations to the agency. Again, this provision refers to the generic legal capacity of an "examiner." See *Christian Care, supra*, at 461 ("We may not interpret R.C. 119.09 in such a manner as to expand the intent expressed therein by the General Assembly"). Therefore, we find these statutes do not stand for the proposition urged by Halleen. Accordingly, Halleen's second assignment of error is overruled.

Halleen argues in its third assignment of error that it was denied due process when the board refused to deliberate or review the hearing examiner's proposed findings after Halleen filed objections to the hearing examiner's decision. After the MVDB failed to act within thirty days of the filing of the hearing examiner's recommendations and declined "to further deliberate on this matter," the recommendations and decision of the examiner were automatically approved. R.C. 4517.58 specifically permits automatic approval "[i]f the board fails to act within thirty days after the board receives a proposed decision from the hearing officer or within any longer period mutually agreed upon by the parties, the proposed decision shall be considered approved." Moreover, Halleen fails to address the trial court's reliance upon *Bob Daniels Buick Co. v. Gen. Motors Corp.* (Oct. 13, 1998), Franklin App. No. 97APE12-1701, unreported. In *Bob Daniels*, we found that the MVDB acted in accord with R.C. 4517.57(D) and 4517.58, by allowing the hearing officer's recommendation to be automatically approved by operation of law when the board's inability to attain a majority vote precluded them from acting on the recommendation. We further stated that "[a]utomatic adoption provisions satisfy due process requirements if the party with the claim of entitlement had the opportunity for a meaningful hearing and consideration of its claim, and the decision adopted by operation of law is consistent with the factual determinations made during the administrative proceeding." *Id.* In the present case, Halleen had a meaningful hearing and consideration of its claim. The examiner made factual considerations based upon evidence and testimony presented at the administrative proceeding.

Further, although Halleen cites *In re Cleveland Clinic Found.* (1994), 94 Ohio App.3d 348, to support its argument that the board's failure to grant a hearing on its objections denied it due process, we already declined to follow that case in *Bob Daniels*, which had similar underlying circumstances as the present case. Further, the statute in *Cleveland Clinic* required "deliberation" of the hearing examiner's decision by the Certificate of Need Review Board. In the present case, R.C. 4517.58 has no such requirement and provides for automatic adoption if no action is taken by the board. Thus, because R.C. 4517.58 allows automatic adoption of a hearing examiner's recommendations, the MVDB did not violate Halleen's due process rights by automatically approving the recommendations without further "deliberation." Therefore, Halleen's third assignment of error is overruled.

In its fifth assignment of error, Halleen argues the hearing examiner's recommendation failed to analyze the entire RMA as required by R.C. 4517.51 and 4517.01(DD), because it only took into consideration individual Area of Geographic Sales and Service Advantage ("AGSSA"). Chevrolet assigns each Chevrolet dealer in a Multiple Dealer Area ("MDA"), such as Cleveland, an AGSSA. Each AGSSA consists of census tracts closest to the dealer's location in terms of geographic distance. The AGSSA to be assigned to the proposed Fairchild dealership is AGSSA 3.

Halleen cites to *Douglas Bigelow Chevrolet, Inc. v. Gen. Motors Corp.* (2000), 138 Ohio App.3d 841, for the proposition that the hearing examiner is required to analyze the entire RMA and not just the AGSSA. In *Bigelow*, we found that R.C. 4517.51 "clearly requires a consideration

of the dealers in the RMA and it cannot be read to permit an analysis of only a small portion of the RMA." *Id.* at 846. Thus, we found that GM's expert could not rely only upon the individual AGSSA. Consequently, we reversed the common pleas court's finding that the hearing officer's conclusions were supported by substantive, reliable, and probative evidence, and remanded the matter to consider the entire RMA.

In the present case, Halleen fails to address the common pleas court's finding on this issue or give any explanation as to how the common pleas court abused its discretion in finding *Bigelow* inapposite. See *Crowe, supra.* We agree with the common pleas court's analysis and do not find it abused its discretion. Before the MVDB, GM's expert presented data as to Chevrolet's penetration performance in the entire RMA over a period of several years; population and household counts and retail growth in the RMA; census tracts in the RMA; new vehicle registration patters in the RMA; opportunity per dealer in the RMA; the location of Chevrolet dealers in the RMA; competition within the RMA; customer convenience levels in the RMA; and lost sales opportunities within the RMA. As the common pleas court found, the hearing examiner's decision indicates that he focused his analysis on the proper geographic area, the RMA. The examiner's decision reflected this data, and the examiner specifically analyzed the entire RMA throughout his decision, including findings 6, 13, 16, 38, 39, 56, 58, 62, 65, 66, 69, 70, 71, 72, 73, 80, 81, 82, and conclusions B, D, and E.

Thus, we find *Bigelow* and the present case distinguishable. Unlike *Bigelow*, in the present case, the hearing examiner's conclusions were not expressly limited to a "significant portion"

of the RMA; neither GM's expert nor the hearing officer only "tangentially" addressed the entire RMA; GM's expert did not testify that he had numbers to analyze the entire RMA but "chose not to do so"; and GM's expert and the hearing examiner cited penetration and competition statistics for the whole RMA, not just the AGSSA. Further, that the hearing examiner discussed AGSSA 3 in his findings, in addition to the RMA, is not fatal to his analysis and ultimate determination. As we pointed out in *Bigelow*, "the RMA may be broken down into smaller areas for analytical purposes ***." *Id.* For the foregoing reasons, we find Halleen's argument not well-taken, and overrule its fifth assignment of error.

In its sixth assignment of error, Halleen asserts the hearing examiner's adoption of GM's proposed findings of fact and conclusions of law were not supported by reliable, probative, and substantial evidence. R.C. 4517.50(B) provides that the franchisor may not relocate a dealer if the MVDB determines that good cause exists for not permitting the dealer to relocate. The franchisor has the burden to establish that good cause exists to relocate a dealer. R.C. 4517.57(C). In determining whether good cause exists, R.C. 4517.51 requires the MVDB to consider the existing circumstances, which include, but are not limited to, the following:

> (A) The effect of an additional or relocated dealer upon the existing new motor vehicle dealer of the same line-make in the relevant market area to be served by the additional franchisee or relocated dealer;

(B) Whether it is injurious or beneficial to the public interest for the dealer to be established or relocated;

(C) Whether the franchisees of the same line-make in the relevant market area are:

(1) Providing adequate competition and convenient consumer care for the motor vehicles of the same line-make in the relevant market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified sales and service personnel;

(2) Providing adequate market penetration and representation.

(D) Whether the franchisor has complied with the requirements of this chapter.

At the outset, we note that Halleen's objections to the hearing examiner's recommendations filed with the board related almost exclusively to the procedural issues regarding the appointment of a second hearing examiner. The only mention of the merits in the objections as it relates to the evidence was one sentence in the conclusion, tersely contending that "the Hearing Examiner's Recommendation and findings are contradicted by, inconsistent with and unsupported by competent credible evidence." As stated previously, generally, the failure to raise an argument before the administrative agency constitutes a waiver of the right to assert such argument. See *Morgan, supra.* Notwithstanding, we will address Halleen's arguments.

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As noted above, our standard of review is limited to whether the common pleas court abused its discretion in finding that the administrative order was or was not supported by reliable, probative, and substantial evidence. *Crowe, supra.* However, Halleen has attempted to reargue its case in its entirety to this court. Noticeably absent from its argument before this court is the contradictory evidence cited by the hearing examiner and the common pleas court. There will nary be a case in this area of law that does not contain contradictory evidence and testimony presented by each side on nearly every factor. Indeed, for the arguments Halleen again asserts before us, there was conflicting testimony, interpretations, analysis, and evidence presented by GM and its expert.

As to the factors set forth in R.C. 4517.51(A), (B), (C), and (D), the hearing officer had to weigh this substantial amount of conflicting evidence presented by the parties' expert witnesses. A common pleas court must defer to an administrative agency's resolution of conflicting evidence if the evidence relied upon by the agency is reliable, probative, and substantial. *Bob Daniels Buick, supra*, citing *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 470-471. In the present case, we find that the common pleas court did not abuse its discretion in deferring to the hearing officer's findings on the directly conflicting testimony, and the record contains reliable, probative, and substantial evidence regarding each of the factors in R.C. 4517.51.

With regard to R.C. 4517.51(A), the common pleas court found there was reliable, probative, and substantial evidence that if Fairchild relocated, there would not be an "oversaturation" or "rampant competition" in the RMA.

Granville Cole, the Cleveland zone manager for Chevrolet Motor Division, testified that two dealerships in the RMA were relocating outside the RMA. Anderson, GM's expert witness, testified that the proper number of Chevrolet dealers are located in the RMA but they are not properly located within the RMA because five of the seven dealers are located in the eastern half where there is declining population and opportunity. In the western half, where the proposed Fairchild dealership would be located, there is increasing population, registrations, and households. Krumholz, Halleen's expert, agreed there has been a shift in population, investments, employment, and higher-income individuals away from Lakewood and toward Westlake.

The common pleas court also cited Anderson's testimony that the RMA is certainly capable of supporting the Fairchild dealership based upon market opportunity because the RMA is one of the largest markets in the state in terms of opportunity but one of the worst in terms of performance for Chevrolet. Anderson also testified that the proposed Fairchild dealership would be located about four and one-half miles from the Halleen dealership, which is typical of the distance the other Chevrolet dealers currently are to the nearest competition in this marketplace. Mark Halleen, the general manager of Halleen Chevrolet, testified that if Fairchild relocates, Halleen will continue to compete and sell cars. The testimony of Victor Nelawake, a CPA, indicated that Halleen is not suffering from rampant competition or oversaturation, finding that Halleen's balance sheet demonstrates it is profitable, very financially viable, well-capitalized, has sufficient cash to maintain its operations, and maintains adequate amounts of inventory.

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Halleen cites Dr. Matthews', Mark Halleen's, and Carl Halleen's (Charles Halleen's nephew, Mark Halleen's father, and fifty-percent owner of Halleen Chevrolet) testimony that Halleen will lose sales and profits if Fairchild relocates. However, the common pleas court relied upon Anderson's contrary opinion that one competitor can stimulate competition among all same line-make competitors and that there is a "tremendous" opportunity for Halleen to benefit from a new dealership nearby. Anderson supported his opinion with empirical studies from four different United States cities demonstrating that after a dealer relocated, the surrounding Chevrolet dealers' sales increased. Further, as the hearing examiner pointed out, Matthews' projections are based upon an unrealistic "static" market, wherein he assumes that if a new dealer relocates, the Chevrolet dealers in the RMA will each lose a portion of their sales every year because aggregate sales numbers will remain unchanged. As the hearing examiner pointed out, Matthews' analysis does not take into account the growth of the market or increased competitive efforts among dealers.

With regard to R.C. 4517.51(B), the common pleas court found there was reliable, probative, and substantial evidence that if Fairchild relocated, it would be beneficial to the public interest. Although Krumholz opined that the proposed relocation would not increase public benefit, there was substantial testimony from Anderson and Robert Fairchild that there has been tremendous retail, population, manufacturing, and lodging growth in the area of the proposed dealership in Westlake and a decline in such areas in Lakewood, and that relocation would benefit the growing population in that area. Fairchild also testified that relocating

would increase customer satisfaction and convenience due to ample customer parking, openness, and a state-of-the-art facility. Fairchild further stated that the land on the proposed site is now largely vacant, and the new construction would increase employment and economic activity. The common pleas court also cited the testimony of Carl Halleen that increased employment, tax revenue, economic activity, and increased competition all benefit the public interest.

With regard to R.C. 4517.51(C)(1), the common pleas court found that there was reliable, probative, and substantial evidence cited by the hearing examiner that the proposed Fairchild dealership would increase competition and customer convenience. The common pleas court cited Fairchild's testimony that the proposed location would be a tremendous convenience for customers because of the easy access off the highway and its location near other retail outlets and shopping centers. Cole also testified that the Fairchild dealership would improve customer convenience, access in the market, and competition. Fairchild further stated that the traffic count for the new location would be ten times greater than the old location. Anderson agreed with this testimony, citing to a study showing that the proposed site is the single best site for maximizing customer convenience for the entire RMA and for minimizing the average distance to a Chevrolet dealership for everyone who lives in the RMA.

With regard to R.C. 4517.51(C)(2), the common pleas court found there was reliable, probative, and substantial evidence cited by the hearing examiner that the existing franchisees are not providing adequate market penetration and representation. The hearing examiner relied upon

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Anderson's testimony that Chevrolet's market share perfomance and market penetration in the entire RMA was less than the expected penetration standard adjusted by product segments. He also stated that Chevrolet's penetration performance in the RMA was "very poor" as compared with Chevrolet's performance throughout the state (1994 — 78.6% of state average; 1995 — 77.8% of state average; 1996 — 72.7% of state average; first nine months of 1997 — 74.8% of state average). Anderson further testified that representation in the RMA as a whole is inadequate, has been over an extended period, and is trending downward. There was also a downward trend in market share performance for the RMA verses the national standard adjusted for local preferences. Anderson further concluded that there was inadequate competition among the Chevrolet dealers in the RMA based upon lost opportunities. Dr. Matthews also testified that the actual Chevrolet registrations for the RMA fell below expected penetration levels although he cautioned he could not state such with statistical certainty.

With regard to R.C. 4517.51(D), Halleen argues that GM has not complied with the provisions of R.C. Chapter 4517 because its proposed financial assistance and special allocation plans relating to Fairchild's new dealership violate R.C. 4517.59(M), which prohibits any predatory practice or discrimination against any new motor vehicle dealer. GM has agreed to provide Fairchild with $350,000 and to consider a special allocation of vehicles if Fairchild relocates. Halleen argues that these arrangements are unfair because it will not receive money from GM and already experiences product shortages. However, the hearing examiner cited testimony demonstrating that these arrangements were not predatory

or discriminatory. David Fowler, an area manager for GM's dealer network development, testified that the $350,000 was for "site control," which assures GM that a piece of real estate is used exclusively for GM operations. He specifically stated that the $350,000 payment made to Fairchild is comparable to the amount of consideration that would be given to other GM dealers in these types of situations where GM is obtaining control of the real estate for twenty-five years. Fairchild was not required to accept the payment for site control, and other dealers have previously refused to relinquish site control to GM and thus, received no payment. As to the special allocation of vehicles, the hearing examiner cited Cole's testimony that when any dealer builds a new facility, GM always considers a request for allocation of vehicles, although it may not allocate any. He stated that the policy was expressed to dealers in 1995, and allows a special allocation request to any dealer that builds a new facility, relocates, renovates, or experiences a loss of inventory due to natural catastrophes. Cole further testified that the policy is used for grand openings at new locations. Therefore, there was reliable, probative, and substantial evidence that these policies are uniform and standard for GM based upon legitimate business purposes.

As the common pleas court noted, the hearing examiner also cited evidence supporting several non-statutory, business-related factors in favor of relocation. Fairchild's net profit deteriorated in recent years, and GM's Project 2000 study found that Fairchild's long-term viability was in jeopardy at its current location. Although Halleen suggests Fairchild's profitability problems are tied to its used car operations, Nelawake testified that the gross profits for both used and new units had been declining in recent years.

Halleen also argues that Fairchild's working capital demonstrates it is in no financial distress. However, as Nelawake explained, because Fairchild's working capital is above standard, its poor performance can be ascribed to the location of the dealership in a deteriorating market. As previously noted, there was also substantial testimony regarding the population and retail shift away from Lakewood and toward the proposed new location.

Further, Fairchild testified that his current location in Lakewood has poor access and half the acreage of the Westlake site. The Lakewood site also lacks convenient parking and an adequate customer waiting area. Halleen counters that Fairchild's problems may be attributed to its lack of investment in its facilities. Halleen argues that its fixed assets at cost between 1993 and 1997, increased by approximately $390,000, while Fairchild's total investment at cost in fixed assets for the same period was only $22,000. However, Fairchild testified that he bought and razed a nearby building to construct a new display area, purchased a double residence and razed it to allow access to another street and more display space, built a seven thousand square-foot service facility on their back lot, and bought a closed gas station to make a truck facility; but the Lakewood facility is now "landlocked" and cannot be expanded. He testified the three acres in Lakewood are convoluted and split-up. Also, he testified that he considered tearing down the Lakewood facilities and rebuilding, but he does not see that as a good investment given the declining market.

Given the proceeding evidence, the record demonstrates that the common pleas court properly exercised its discretion

and deferred to the hearing examiner's resolution of the evidentiary conflicts. The Ohio Supreme Court stated:

> [A]n agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable. *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.

In the present case, the hearing examiner's findings were not internally inconsistent, did not rest upon improper inferences, and were not otherwise unsupportable. Because the common pleas court properly exercised its discretion in determining that the decision of the MVDB was supported by reliable, probative, and substantial evidence, Halleen's sixth assignment of error is overruled.

Halleen argues in its fourth assignment of error that the MVDB's decision is contrary to public policy. Halleen's argument is, generally, that one of the specific purposes of R.C. 4517.51 is to prevent the oversaturation of a franchisee's market area. Because we have found the trial court did not abuse its discretion in finding there was reliable, probative, and substantial evidence demonstrating good cause for the relocation of the Fairchild dealership, we find Halleen's argument that the relocation is against public policy to be unfounded. We already found under our discussion of R.C. 4517.51 that the proposed relocation would be beneficial to the public interest and that inadequate competition existed in the RMA. Therefore, Halleen's fourth assignment of error is overruled.

Accordingly, Halleen's six assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LAZARUS and TYACK, JJ., concur.

APPENDIX B — DECISION AND JUDGMENT OF THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO DATED DECEMBER 4, 2000

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CASE NO. 99CVE-12-10512

JUDGE CONNOR

HALLEEN CHEVROLET, INC., et al.

Appellants,

vs.

GENERAL MOTORS CORPORATION

Defendant .

DECISION AND JUDGMENT ENTRY AFFIRMING THE DECISION OF THE MOTOR VEHICLE DEALERS BOARD OF OHIO, DENYING APPELLANTS' MOTION TO STAY FILED JANUARY 20, 2000, AND GRANTING APPELLEES' MOTIONS FOR LEAVE FILED MARCH 20, 2000 AND JUNE 6, 2000

Rendered this 4th day of December 2000

CONNOR, J.

Appendix B

This case is before the Court on a R.C. 119.12 appeal from a decision of the Motor Vehicle Dealers Board of Ohio (hereinafter "MVDB") determining that good cause exists to permit Fairchild Chevrolet (hereinafter "Fairchild") to relocate.

This matter was initiated when Appellee General Motors Corporation (hereinafter "GM") gave Appellants Halleen Chevrolet and Charles Halleen (hereinafter referred to collectively as "Halleen") Notice of Intent to Relocate Fairchild from 12120 Detroit Road, Lakewood, Ohio, to the intersection of Detroit and Columbia Road in Westlake, Ohio.

Halleen timely filed a protest, pursuant to R.C. 4517.50(A). A hearing was held before Hearing Examiner Robert Carter commencing July 6, 1998, and concluding July 16, 1998. Voluminous evidence was presented. GM presented the testimony of expert witness James A. Anderson. Halleen presented the testimony of expert witnesses Professors John Matthews and Norman Krumholz. Numerous additional witnesses testified. After Hearing Examiner Carter failed to issue a recommendation and stopped communicating with the MVDB, the MVDB reassigned his cases, including this one. On March 26, 1999, the MVDB reassigned the matter to Hearing Examiner Larry H. James, who conducted a full-day hearing, heard arguments from counsel, and inspected the dealership sites. On October 18, 1999, Hearing Examiner James issued Recommended Findings of Fact and Conclusions of Law.

The Hearing Examiner determined that good cause existed to permit Fairchild to relocate. Some of his key findings are as follows:

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• Economic growth, jobs, population, new car registrations, and retail activity are shifting from Fairchild's current location westward toward Westlake, where Fairchild proposes to move.

• Fairchild is currently housed in an outdated, 5-year old facility on a landlocked site. The proposed site will offer greater visibility and access immediately off an interstate exit. The relocation will result in a new facility, an investment of approximately $5 million, increased employment, and will benefit the public interest.

• The proposed site will increase customer convenience in the Relevant Market Area. Relocation will enhance competition, which is inadequate in the Relevant Market Area.

• There is presently inadequate market penetration and representation in the Relevant Market Area. Chevrolet's market penetration in the Relevant Market Area has consistently been well below the State average. The RMA is one of the largest in the state in terms of opportunity and one of the worst in terms of performance for Chevrolet.

• The distance that will separate Halleen and Fairchild after relocation is comparable to or greater than the distance separate the existing dealerships in the area. Two dealers closest to Halleen are leaving the Relevant Market Area. There are ample untapped sales opportunities available to Halleen and Fairchild after the relocation.

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On November 22, 1999, the MVDB notified the parties that it had declined to further deliberate the matter and, pursuant to the automatic adoption provision in R.C. 4517.58, the recommendation of the Hearing Examiner was adopted and approved.

On December 8, 1999, Halleen filed this appeal. Appellants' assignments of error are as follows:

> Assignment of Error No. I: Halleen was Denied its Constitutionally Protected Right of Due Process When the Hearing Examiner Proceeded to Make a Recommendation Without a Hearing or Evidence
>
> Assignment of Error No. II: Halleen was Denied its Constitutionally Protected Right of Due Process when the Ohio Motor Vehicle Dealers Board Refused to Grant Halleens' Objections or Review the Hearing Examiner's Findings
>
> Assignment of Error No. III: The Hearing Examiner's Adoption of GM's Proposed Findings of Fact and Conclusions of Law was not Supported by Reliable, Probative and Substantial Evidence and in Accordance with Law
>
> Assignment of Error No. IV: The Hearing Examiner's Recommendation is Contrary to the Ohio Motor Vehicle Dealer Board and Appellate Decision [*sic*].
>
> Assignment of Error No. V: The Hearing Examiner's Recommendations Failed to Apply the Relevant Market Area Analysis as Required by R.C. 4517.51 and 4517.01(DD).

Appendix B

Standard of Review

A party adversely affected by an order of an agency may appeal that order to the court of common pleas pursuant to Revised Code Chapter 119. The court must affirm the order of the agency if "it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12.

As a common pleas court reviews an agency's order, it performs a hybrid function: It makes a determination of the law and considers the evidence revealed at the administrative level. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108. The general rule is that the court should give deference to the administrative resolution of evidentiary conflicts. *Id.*, pg. 111. "An agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable. Ohio *Historical Society v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471. "Even in the face of disputed evidence, as long as an agency's decision is supported by reliable, probative and substantial evidence, a common pleas court may not substitute its own judgment for that of the agency." *General Motors Corp. v. Joe O'Brien Chevrolet, Inc.* (Franklin Cty. App. 1997), 118 Ohio App.3d 470, 482, 693 N.E.2d 317 (1997). Whether there is any evidence to support a decision is a question of law. *Conrad, supra,* at pg. 111.

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First Assignment of Error

In its first assignment of error, Halleen argues that its due process rights were violated because Hearing Examiner James made a recommendation to the MVDB even though he did not preside over the evidentiary hearing held on July 6-16, 1998.[1] Halleen argues that the Hearing Examiner did not have an opportunity to observe the witnesses and evaluate their credibility.

The Ohio Supreme Court has held that the substitution of hearing examiners does not constitute a denial of due process or equal protection. This issue was addressed in *Laughlin v. Public Utilities Commission* (1966), 6 Ohio St.2d 110. In that case, the hearing examiner before whom the hearing was commenced resigned and another hearing examiner completed the hearing. The transcripts and exhibits were then referred to a third examiner who made the report and recommendation. The Court stated:

> Appellants contend they were denied a fair hearing and deprived of due process of law by the commission's assignment of an attorney to prepare findings and recommendations, who had not presided at the hearings. This contention is

---

1. The Ohio Supreme Court has already reviewed this issue on a writ of prohibition. In *State ex rel. Halleen Chevrolet v. Larry H. James,* Ohio Supreme Court, Case No. 99-1071, Halleen asked the Court to prohibit Hearing Examiner James from proceeding with the case unless an entire new trial were held. Halleen made the same procedural arguments advanced here. However, the Court granted the MVDB's Motion to Dismiss.

> without merit. **It is not essential that a person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he review and examines the record of the proceeding.**

(emphasis added; *Id.* at pg. 111).

The same issue was addressed in *Ritchie Photographic v. Limbach* (1994), 71 Ohio St.3d 440. The court stated the issue as follows: "Ritchie alleges the B[oard of] T[ax] A[ppeals] violated its right of due process of law and denied it the equal protection of the laws because the BTA changed attorney examiners during the process of deciding the case." The Court rejected this argument, relying upon *Laughlin, supra. Id.* at p. 441.

A review of the governing statutes shows that the adjudicatory procedure followed here was in accordance with law. Pursuant to R.C. 4517.57, the hearing on Appellants' protests was subject to sections 119.01 to 119.13 of the Revised Code. R.C. 4517.57 authorizes the MVDB to designate a hearing officer to hear the evidence. As authorized by R.C. 4517.58, the MVDB allowed the recommendation of the hearing examiner to be automatically adopted and approved.

R.C. 119.09, outlining the adjudicatory procedure for administrative cases, provides:

> In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may appoint a referee or examiner to conduct said hearing. He shall have the same powers and

> authority in conducting said hearing as granted to the agency. . . . The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties and additional testimony and evidence ***shall have the same effect as if such hearing had been conducted by the agency.*** (emphasis added)

Pursuant to R.C. 119.09, the approval of the MVDB under R.C. 4517.58 has **the same effect as if the MVDB had heard the evidence actually heard by both hearing examiners.** Since the MVDB is treated as having heard all of the evidence, it is clear that the substitution of hearing examiners here had no legal significance.

In re Christian Care Home of Cincinnati, Inc. (Franklin App. 1991), 74 Ohio App.3d 453, 599 N.E.2d 342, is also on point on this issue. In that case, the appellant also argued that the appointment of a new hearing examiner violated due process requirements because the new hearing examiner did not have the opportunity to observe the demeanor of the witnesses. After citing the just quoted portion of R.C. 119.09, the court stated:

> The statute indicates that the board herein was permitted to accept the evidence presented to and evaluated by the board's hearing examiner as if

> the hearing had been conducted by the board itself. There is no specific requirement in the statute that the hearing examiner's report and recommendation must be based upon live testimony, nor is there a requirement that the same hearing examiner must conduct all hearings or review all evidence in the same manner.

74 Ohio App.3d at pgs. 460-61. The court added:

> [W]e do not agree . . . that a due process violation occurred simply because the board appointed a different hearing examiner to conduct further review rather than doing so itself. The board was entitled to accept or reject her report and recommendation, so that the board retained its power of review while delegating to the hearing examiner the duty of assessing the issues and evidence previously not considered by the board. [*Id.* at pg. 461].

Just as in *Christian Care Home,* the statutory structure here permitted the board to designate a hearing officer. There is also no specific requirement that the same individual serving as the hearing examiner must conduct all hearings or review all evidence. Rather, the statute merely says that the MVDB shall designate a hearing officer who shall hear the evidence and issue findings and recommendations. The "hearing examiner" referenced in the statute is a legal capacity or position analogous to that of a judge, rather than a particular individual. The procedure followed in this case was thus in accordance with R.C. 4517.57 and 4517.57.

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Appellants have cited absolutely no Ohio authority holding that substitution of a hearing examiner constitutes a deprivation of due process. *Kremer v. State Medical Board* (1996), 1996 Ohio App. Lexis 949, No. 95APE09-1247, cited by Appellants, does not support their arguments. In that case, the court found that substitution of hearing examiners was not legally significant where the State Medical Board had reviewed the evidence. That case is plainly inapposite because here there is an **automatic** adoption procedure that was followed under R.C. 4517.58. That feature of R.C. 4517.58 obviates any need for the MVDB to review or even vote on the Hearing Examiner's report and recommendation.

For the foregoing reasons, Appellants' First Assignment of Error is overruled.

Second Assignment of Error

Appellants' Second Assignment of Error asserts that due process requirements were violated when the MVDB allowed the Hearing Examiner's recommendation to be adopted automatically. Appellants argue that due process required the MVDB to deliberate on the Hearing Examiner's recommendation and make a decision on the merits of Appellants' claims.

Bob Daniels Buick v. General Motors Corporation (Franklin Cty. App. 1998), 1998 Ohio App. Lexis 4862, No. 97APE12-1701, is directly on point on this issue. In that case, Bob Daniels Buick argued that its right to due process was violated when the MVDB, pursuant to R.C. 4517.58, allowed the hearing examiner's report to be adopted

automatically, without a further vote or hearing. The Franklin County Court of Appeals held that Bob Daniels did not suffer a deprivation of due process because the MVDB had properly applied the administrative procedures under R.C. Chapter 4517. The court stated:

> Automatic adoption provisions satisfy due process requirements if the party with the claim of entitlement had the opportunity for a meaningful hearing and consideration of its claim, and the decision adopted by operation of law is consistent with the factual determinations made during the administrative proceeding. (pg. 13 of opinion).

The court added: "No deprivation occurred because Bob Daniels exercised its right to protest the proposed dealer and the final decision resulted from an adjudication where the hearing examiner determined that GM had established its burden of persuasion." *Id.* at pg. 14.

Bob Daniels Buick is dispositive of Appellants' argument that automatic approval of the Hearing Examiner's report violated due process requirements. As in *Bob Daniels Buick,* Appellants received a meaningful hearing where the hearing examiner determined that GM had established its burden of persuasion.

The hearing in this matter lasted approximately eight days, and thirteen witnesses testified. When there had been no decision eight months after the hearing and the original Hearing Examiner had failed to act in a number of cases, the MVDB reassigned all of his cases, including this one.

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The new Hearing Examiner reviewed the entire evidentiary record, conducted a personal inspection of all of the dealership sites at issue in the Cleveland area, requested new briefs, and held a full-day hearing on June 11, 1999 at which counsel argued their positions and reviewed the evidence. At the June 11, 1999 hearing, the Hearing Examiner expressly informed the parties that he then had the full record and that following counsels' arguments he would "review everything in total, including the exhibits that have been admitted." (June 11, 1999 transcript at pgs. 5-6) After doing so, he issued a lengthy and detailed decision. Accordingly, Halleen had a full hearing on the merits, a full record was developed, and the record was reviewed by Hearing Examiner James, who issued a decision on the merits.

Appellants criticize the Hearing Examiner's decision by asserting that the Hearing Examiner adopted 99% of GM's proposed findings. It appears that the Hearing Examiner revised approximately thirty factual findings proposed by GM and rejected approximately thirty other findings that GM submitted. However, the key consideration is not whether the Hearing Examiner adopted proposed findings submitted by a prevailing party, but whether the Hearing Examiner reviewed the evidence and reached a decision that has evidentiary support. There is no basis to question that the Hearing Examiner reviewed the entire record. Moreover, as set forth below, there is ample evidence to support the Hearing Examiner's findings.

Appellants cite *In re Cleveland Clinic* (Franklin Cty. App. 1994), 94 Ohio App.3d 348, arguing that insufficient process is provided when a board fails to decide claims on their merits.

That case is inapposite because the statute there expressly required "deliberation" by the administrative board, whereas the statute here expressly provides that the hearing examiner's decision may be approved automatically by operation of law. Moreover, *Bob Daniels Buick,* a subsequent decision by the Franklin County Court of Appeals, discusses *In re Cleveland Clinic,* and holds that the automatic adoption procedure under R.C. 4517.58 provides sufficient constitutional due process.

For the foregoing reasons, Appellants' Second Assignment of Error is overruled.

Third and Fourth Assignments of Error

Appellants' Third and Fourth Assignments of Error will be discussed together. The Third Assignment of Error asserts that the Hearing Examiner's decision was not supported by reliable, probative and substantial evidence and in accordance with law. The Fourth Assignment of Error asserts that the decision is not in accordance with prior MVDB and court decisions.

The court must affirm the Hearing Examiner's decision if it is supported by reliable, probative, and substantial evidence. R.C. 119.12. The general rule is that the court should give due deference to the administrative resolution of evidentiary conflicts. "[W]hen the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body . . . " *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

The Hearing Examiner weighed the voluminous evidence that the parties submitted and determined that GM demonstrated

good cause for relocation of Fairchild. As to the factors set forth in R.C. 4517, the Hearing Examiner had to weigh a substantial amount of conflicting evidence presented primarily through the parties' expert witnesses. The record contains reliable, probative, and substantial evidence submitted by GM that addresses these factors. Given that evidence, this Court should defer to the Hearing Examiner's resolution of the evidentiary conflicts.

The issue in this case is whether there is "good cause" to permit Fairchild to relocate. R.C. 4517.50 provides that no motor vehicle franchisor shall establish or relocate a dealership unless the MVDB determines that there is "good cause" to do so. An existing dealer has a right to protest a relocation, but it is the manufacturer who has the burden to establish good cause for such a move. In determining whether good cause exists, R.C. 4517.51 requires the MVDB to consider the existing circumstances, which include but are not limited to, the following:

(A) The effect of an additional or relocated dealer upon the existing new motor vehicle dealers of the same line-make in the relevant market area to be served by the additional franchisee or relocated dealer;

(B) Whether it is injurious or beneficial to the public interest for the dealer to be established or relocated;

(C) Whether the franchisees of the same line-make in the relevant market area are:

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(1) Providing adequate competition and convenient consumer care for the motor vehicles of the same line-make in the relevant market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified sales and service personnel;

(2) Providing adequate market penetration and representation.

(D) Whether the franchisor has complied with the requirements of this chapter.

A review of the evidence shows that as to each statutory factor, the decision of the Hearing Examiner is supported by reliable, probative and substantial evidence.

1. **Effect Upon Existing Dealers**

The first statutory factor addresses the effect of the relocation upon existing new motor vehicle dealers of the same line-make in the relevant market area to be served by the relocated dealer. Evidence relied upon by the Hearing Examiner as to this factor includes the following:

- The two Chevrolet dealers closest to Halleen are leaving the Relevant Market Area. ("RMA"). This expands the opportunities available to Halleen and there is no "oversaturation" or "rampant competition". (Tr. Pgs. 392, 495; R. 19).

• Although Chevrolet has roughly the proper number of dealers in the RMA, they are not properly located: (Tr. Pgs. 294, 309-311, 320-321). Five of the seven dealers are concentrated in the eastern half of the RMA, while only two are located in the western half, where the growth in the RMA is predominantly occurring. (*Id.*)

• Market studies show there are untapped sales opportunities available to all of the Chevrolet dealers in the RMA and that the RMA is one of the largest markets in the state in terms of opportunity and one of the worst in terms of performance for Chevrolet (Tr. Pgs. 311-313; R. 70, pg. 41).

• The four and one-half mile distance that will separate Halleen and Fairchild after the move is comparable to or greater than the distances that separate almost all of the existing Chevrolet dealerships in the Cleveland Multiple Dealer Area (Tr. Pgs. 214-215)

• Halleen is in good financial condition, is well capitalized, and has been very profitable. (Tr. P. 727-32, 1435-36, 1488; R. 38, R. 63, R. 71)

Halleen claims that the relocation will cause it to lose sales and profits. This claim was contradicted by GM's expert, who testified that increased penetration of the market and increased competition will stimulate the market and

increase the sales opportunities for all of the dealers in the RMA. (Tr. Pgs. 341-44, 1313-14). In any event, mere claims of potential lost sales or lost profits are insufficient to block a relocation. As the Franklin County Court of Appeals has found:

> [I]n virtually every case in which a dealer is introduced into another dealer's market, the existing dealer will be able to offer some evidence of lost sales and profits. Hence, if lost profits alone were enough to prohibit entry into a dealer's market, then the statute in practical effect would prohibit the franchising of any new dealers within the existing dealership's territory — a patently anticompetitive result that could not have reasonably been intended by the legislature.

Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Case No. 91AP-1493 (Franklin Cty. App. 1992), pg. 17.

2. **The Public Interest**

Evidence relied upon by the Hearing Examiner as to this factor includes the following:

> • The market in Cleveland has undergone a tremendous shift, with growth, jobs, population, new car registrations and retail activity moving away from areas like Lakewood — where Fairchild currently operates — toward Westlake, where Fairchild proposes to move. (Tr. Pgs. 28-39, 47, 59, 150-51, 155-57, 169, 177, 291-295, 320-321, 387, 420-421, 832-843, 869).

- The relocation will result in a sizable investment in new construction and economic activity of approximately $5 million and increased employment. (Tr. Pgs. 36-37).

- Fairchild's current facility is outmoded, has extremely limited off-street parking and limits customer convenience and accessibility. (Tr. pgs 37-38, 55-56, 420-421, 525-526)

- Increased competition benefits the public interest. (Tr. p. 1485)

3. **Whether Existing Franchisees are Providing Adequate Competition and Convenient Consumer Care**

Evidence relied upon by the Hearing Examiner as to this factor includes the following:

- The proposed Fairchild location near the intersection of I-90 and Columbia Road is more convenient and readily accessible than the current site. (Tr. Pgs. 28-29, 33-36, 40-42, 384-85, 1185, 1255-59, 1481-82). The new site will offer greater visibility off an interstate exist and in an area of growing retail activity. Traffic count at the new location is ten-fold higher than Fairchild's current location. (Tr. P. 33).

- GM's expert examined the RMA as a whole on the issue of consumer convenience. (Tr. Pg. 321-25, p. 328; R. 70, p. 58). GM presented evidence that Fairchild's proposed site is at the optimal location

to maximize customer convenience in the RMA as a whole. (*Id.*). He found that customer convenience in the RMA will improve dramati-cally if Fairchild relocates. (Tr. Pgs. 318-24, R-70, pgs. 57-58)

4. **Whether Existing Franchisees are Providing Adequate Market Penetration and Representation**

Evidence relied upon by the Hearing Examiner as to this factor includes the following:

- Chevrolet's market penetration falls below the expected penetration standard adjusted by product segments. (Tr. Pgs. 246-72, 1197-1203; R. 70, pgs. 5-22). In 1994, Chevrolet's penetration in the RMA was only 78.6% of the State average; in 1995 it was 77.8%; in 1996 it was 72.7%; and from January to September, 1997 it was 74.8% of the State average, falling 25% short of expected penetration levels. (Tr. Pgs. 268-69; R. 70, pg. 15).

- GM's expert examined household levels and growth in the RMA, patterns of new vehicle registration in the RMA, and location of dealers in the RMA to see if they were adequately serving the market. (Tr. Pg. 294, 309-311, 318-321, R-70, pg. 40)

- GM's expert examined every census tract in the RMA as part of his study of lost registrations, concluding that there were larger numbers of untapped Chevrolet sales in the RMA. (Tr., pgs. 330-334, 339, 1155-57; R-70, pg. 60)

- GM's expert found inadequate competition among the Chevrolet dealers in the RMA. (Tr. P. 330-34, 339, 1155-57; R-70, pg. 60)

5. **Other Business Reasons for the Relocation**

In addition to the non-exclusive list of statutory factors, the evidence of other business reasons for the relocation relied upon by the Hearing Examiner included the following:

- Fairchild's net profits have deteriorated in recent years, including sliding gross profits per unit on both new and used cars.(Tr. Pgs. 771-73, 1607, 1602-03). After studying the market and Fairchild's operating reports, GM's Project 2000 study found that dealership's long-term viability is in serious jeopardy if it stays at the current location. (Tr. Pgs. 738-39).

- As a result of shift in growth westward toward Lakewood, the opportunity for automobile sales in Fairchild's current location has declined substantially over the years. The new facility will be located in the area where shopping patterns have shifted. (Tr. P. 42). Westlake has had tremendous retail growth (Tr. Pgs. 28-39, 41-42) and is the fastest growing city in Cuyahoga County.

- Fairchild is located in an outdated 50-year-old facility and is situated on a landlocked site less than half the size of the proposed site. (Tr. Pgs. 37-38, 55-56, 420-421, 525-526). The current location

> does not contain a convenient parking area; there is no modern customer waiting area. The service department is inefficient and poorly situated because of physical constraints in the layout of the building. (*Id.*). The proposed site is much larger in available usable space — seven acres versus three acres.

With respect to the overall state of the evidence, this case is similar to *General Motors Corp. v. Joe O'Brien Chevrolet, Inc., supra.* In that case, the issue was whether good cause existed for relocation of a dealer. GM presented the same expert witness as in this case, Mr. Anderson, to show good cause. In opposition, O'Brien also presented the same experts, Professors Matthews and Krumholz. The opinions of the experts were very similar to the opinions in this case. The court found that, as here, "the parties' experts disagreed on almost every one of the nonexclusive statutory factors." 118 Ohio App.3d at pg. 484. "With respect to the enumerated factors, the hearing examiner's conclusions were largely in agreement with those of Professor Matthews, while the court of common pleas agreed completely with those of Mr. Anderson." *Id.* The Court of Appeals found that by reversing the MVDB when there was ample evidence on both sides, the common pleas court had improperly substituted its judgment for that of the MVDB:

> The common pleas court, acting as the reviewing court, failed to give due deference to the administrative resolution of evidentiary conflicts .... The court's failure to defer to the determination of the administrative body when the expert

> evidence consisted of conflicting testimony of approximately equal weight was an abuse of discretion." 118 Ohio App.3d at pgs. 484-5.

For the foregoing reasons, Appellant's Third and Fourth Assignments of Error are overruled.

Fifth Assignment of Error

Appellants' Fifth Assignment of Error asserts that the Hearing Examiner failed to analyze the Relevant Market Area ("RMA") as required by R.C. 4517.51. Appellants argue that the Hearing Examiner erroneously focused on a smaller geographic area known as an Area of Geographic Sales and Service Advantage ("AGSSA"), rather than the RMA. Appellants' argument is based on *Douglas Bigelow, Chevrolet, Inc. v. General Motors Corporation* (Aug. 24, 2000), Franklin Cty. App. No. 99AP-1068, 2000 WL 119220 unreported.

In *Bigelow,* the Court of Appeals reversed a finding by the MVDB that good cause existed for relocation of an automobile dealer. The court found that the MVDB's analysis had focused on an inappropriate geographic area. The court stated that R.C. 4517.51 "clearly requires a consideration of the dealers in the RMA and it cannot be read to permit an analysis of only a small portion of the RMA." (pg. 3 of opinion). The court concluded that the MVDB misapplied the RMA and instead improperly focused on an AGSSA, a smaller area inside the RMA. The court noted that GM's expert's conclusions were based on the AGSSA, and "only tangentially addressed the entire RMA". (*Id.*, pg. 2).

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The court held that "While the RMA may be broken down into smaller areas for analytical purposes, the RMA, and not simply one small portion of it, must be considered." (*Id.*, pg. 3).

It is clear from a review of his lengthy, detailed decision that the Hearing Examiner focused his analysis on the proper geographic area, the RMA. The RMA is expressly mentioned in many of the Hearing Examiner's factual findings. In Finding 56, for example, the Hearing Examiner stated:

> Chevrolet's retail penetration performance in the Westlake RMA has also fallen short of the penetration achieved by Chevrolet in the State of Ohio. In 1994, Chevrolet's penetration in the RMA was 78.6% of the State average. In 1995, Chevrolet's penetration reached 77.8% of the State level. In 1996, it was 72.7% of the State level. In the period January to September, 1997, Chevrolet's penetration level in the RMA was 74.8% of the State level, 26 percentage points short of expected penetration levels.

Similar examples include Finding 62 (regarding population growth in the RMA), 65 (growth in registrations in the RMA), 66 (location of dealers in the RMA), 69 (opportunities for dealers in the RMA), and 70 (opportunities available to dealers in the RMA). The fact that the findings also mention AGSSA 3 is not of consequence; in *Bigelow,* the Court of Appeals stated that the RMA may also be broken down for analytical purposes (pg. 3 of opinion).

Appendix B

The Hearing Examiner's Conclusions of Law are also based on the RMA. The Conclusions of Law include the following:

> B. The relocation of Fairchild Chevrolet would not result in a loss of sales to the motor vehicle dealers of the same line-make in **the RMA**. There are ample additional opportunities for sales of new units of Chevrolet vehicles within **the RMA** . . . The other Chevrolet dealers in the RMA are not adequately penetrating **the RMA** . . .
>
> D. Franchisees of the same line-make in **the RMA** are not providing adequate competition and convenient consumer care for motor vehicles of the same line-make. **The RMA,** the MDA and AGSSA 3 are inadequate in terms of adequate competition and convenient consumer care for Chevrolet vehicles.
>
> E. The existing Chevrolet dealers in **the relevant market area** are not providing adequate and convenient access to the sale of new motor vehicles in comparison to the access and convenience available at the proposed Fairchild location.

(emphasis added; Hearing Examiner Decision, pg. 28.)

For these reasons, the Hearing Examiner's Decision is in compliance with *Bigelow,* in that, in accordance with R.C. 4517.51, it focuses on the appropriate geographic area, the RMA. Accordingly, Appellants' Fifth Assignment of Error is overruled.

Appendix B

The Court finds that there is ample evidence to support the decision of the MVDB in this matter, and its decision is, therefore, **AFFIRMED**. Appellants' Motion to Stay filed January 20, 2000, is denied as moot. Appellee General Motors Corporations Motions for Leave to File Sur-Replies, filed on March 20, 2000 and June 6, 2000, are granted, as Appellants responded to the arguments contained in the sur-replies in their own filings. Costs to Appellants.

s/ John A. Connor
JOHN A. CONNOR, JUDGE

* * * *

APPENDIX C — ENTRY OF THE SUPREME COURT OF OHIO DATED AND FILED OCTOBER 24, 2001

THE SUPREME COURT OF OHIO

Case No. 01-1440

Halleen Chevrolet, Inc., et al.,

Appellants,

v.

General Motors Corporation et al.,

Appellees.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Morganstern, Macadams & Devito.

(Franklin County Court of Appeals; No. 00AP1454)

s/ Thomas J. Moyer
Thomas J. Moyer
Chief Justice

APPENDIX D — RECONSIDERATION ENTRY OF THE SUPREME COURT OF OHIO DENYING MOTION FOR RECONSIDERATION DATED AND FILED DECEMBER 5, 2001

THE SUPREME COURT OF OHIO

Case No. 01-1440

Halleen Chevrolet, Inc., et al.,

Appellants,

v.

General Motors Corporation et al.,

Appellees.

RECONSIDERATION ENTRY

(Franklin County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 00AP1454)

s/ Thomas J. Moyer
Thomas J. Moyer
Chief Justice

APPENDIX E — LETTER FROM THE OHIO DEPARTMENT OF PUBLIC SAFETY DATED NOVEMBER 22, 1999

OHIO DEPARTMENT OF PUBLIC SAFETY

Bob Taft,
Governor

Maureen O'Connor,
Lt. Governor/Director

Franklin R. Caltrider
Registrar, Bureau of Motor Vehicles
1970 W. Broad Street
P.O. Box 16520
Columbus, Ohio 43266-0020
(614) 752-7500

November 22, 1999

Jeffrey J. Jones, Esq.
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By Certified Mail, #Z 331 710 924

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Appendix E

Stanley Morganstern, Esq.
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Larry H. James
Administrative Hearing Examiner
Crabbe, Brown, Jones, Potts & Schmidt
500 South Front Street, Suite 1200
Columbus, Ohio 43215
By regular mail service

Re: Halleen Chevrolet, Inc., et al. vs. General Motors Corporation
Case #97-4-MVDB-204-J

Dear Messrs. Jones, Mansfield, Lines, Morganstern, DeVito, McKirahan, Whann, and James:

The Recommendation of Hearing Examiner Larry H. James in the matter of Halleen Chevrolet, Inc., et al. vs. General Motors Corporation, was filed on October 20, 1999.

Appendix E

Pursuant to Section 4517.58 of the Ohio Revised Code, the failure of the Motor Vehicle Dealers Board to act within thirty (30) days after the Board receives a proposed decision from the hearing officer or within any longer period mutually agreed on by both parties, results in the proposed decision of the hearing officer being considered approved. The Motor Vehicle Dealers Board has declined to further deliberate on this matter, therefore, ***the recommendation is approved.***

Any person adversely affected by the decision may appeal in the manner provided by sections 119.01 to 119.13 of the Revised Code.

If you have further questions regarding this matter, please direct them to 614-752-7009.

Sincerely,

s/ Franklin R. Caltrider
FRANKLIN R. CALTRIDER
SECRETARY

APPENDIX F — ENTRY DATED JUNE 3, 1999

IN THE STATE OF OHIO, MOTOR VEHICLE BOARD

Case No.97-4-MVDB-204-J

Hearing Examiner Larry H. James

In Re Protest By:

Halleen Chevrolet, Inc., et al

Protestant

vs.

General Motors, Inc.,

Respondent.

ENTRY

This matter was originally scheduled for a hearing on June 9, 10, and 11, 1999. The hearing will take place on Friday, June 11, 1999 at 10:00 a.m. at the office of **Crabbe, Brown, Jones, Potts & Schmidt.** Protestants' objection to the entry to proceed as a summary jury trial is hereby denied. Denial is based on the reasoning in Laughlin v. P.U.C.O., 6 Ohio St. 2d 110 (1966) and Ritchie Photographic v. Limbach, 71 Ohio St. 3d 440 (1994). Attached as exhibit A and exhibit B.

Appendix F

It is so ordered.

s/ Larry H. James
Larry H. James
Supreme Court No. 0021773
Crabbe, Brown, Jones, Potts & Schmidt
500 South Front Street, Suite 1200
Columbus, Ohio 43215
Tel (614) 229-5511
Fax (614) 229-4559
Hearing Examiner

APPENDIX G — ENTRY DATED MAY 17, 1999

IN THE STATE OF OHIO, MOTOR VEHICLE BOARD

Case No.97-4-MVDB-204-J

Hearing Examiner Larry H. James

In Re Protest By:

Halleen Chevrolet, Inc. et al

Protestant

vs.

General Motors, Inc.,

Respondent.

ENTRY

This matter came on for a Status Conferencee on Thursday, April 29, 1999. Counsel for Protestant objected to the transfer of this case to a new hearing examiner. In the alternative, counsel for Protestant requested a Trial De Novo. Counsel for Respondent has filed a Memorandum in Opposition to a Trial De Novo and has agreed that this matter may be assigned to a new hearing examiner.

Appendix G

This case is scheduled for a site visit on Monday, May 17, 1999 at 10:00 a.m. Counsel shall provide the Hearing Examiner with an agreed upon location to meet for the site visit and shall provide directions to the site. Counsel shall file their exhibit list on or before May 24, 1999. Counsel may file supplemental briefs regarding the reassignment of this case to a new Hearing Examiner on or before May 24, 1999.

Counsel shall file their Pre-Hearing Briefs on or before June 4, 1999. This matter is scheduled for a hearing on June 9, 10, and 11, 1999 at the office of **Crabbe, Brown, Jones, Potts & Schmidt**, 500 South Front Street, Suite 1200, Columbus, Ohio. The hearing shall start each day at 9:00 a.m.

Counsel for Protestant has requested a Trial De Novo. Counsel for Respondent has requested that this matter proceed in the form of a summary jury trial. Under the summary jury trial format, counsel will present an overview of the case. Counsel also discussed the option of a bifurcated hearing that will include an overview by counsel as well as video testimony and/or live testimony by certain witnesses. Counsel shall be notified on or before June 1, 1999 of the format for the hearing.

It is so ordered.

s/ Larry H. James
Larry H. James
Supreme Court No. 0021773
Crabbe, Brown, Jones, Potts & Schmidt
500 South Front Street, Suite 1200
Columbus, Ohio 43215
Tel (614) 229-5511
Fax (614) 229-4559
Hearing Examiner

APPENDIX H — LETTER FROM THE OHIO DEPARTMENT OF PUBLIC SAFETY DATED MARCH 26, 1999

OHIO DEPARTMENT OF PUBLIC SAFETY

Bob Taft,
Governor

Maureen O'Connor,
Lt. Governor/Director

Franklin R. Caltrider
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March 26, 1999

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Appendix H

Re: Case #97-4-MVDB-204-**J**
Halleen Chevrolet, Inc., et al. vs. GMC

Dear Messrs. DeVito, Jones, and Mansfield:

The above case has been reassigned from Hearing Examiner Carter to the following Hearing Examiner:

Larry H. James, Administrative Hearing Examiner
Crabbe, Brown, Jones, Potts & Schmidt
500 South Front Street, Suite 1200 Phone: 614-229-4566
Columbus, Ohio 43215 Fax: 614-229-4559

Please note the change of the case number as indicated above. Mr. James will most likely contact you to arrange a status conference. He will need to see hearing exhibits, hearing transcript, and any other documents which were not on file in this office. You should consult each other and agree as to what the record for this case consists of. For your information, we have attached a listing of the documents which this office has copied and forwarded to Mr. James.

If you have questions, please contact Jeffrey Coleman or Peggy Barber at 614-752-7009.

Sincerely,

s/ Franklin R. Caltrider
FRANKLIN R. CALTRIDER
SECRETARY

c: Larry H. James, Administrative Hearing Examiner

Appendix H

LIST OF DOCUMENTS ON FILE WITH BMV FOR:

HALLEEN CHEVROLET, INC. vs. GENERAL MOTORS CORPORATION
97-4-MVDB-204-C

[List Of Documents Omitted]

* * *

DATE	DOCUMENT
04-30-97	Cover letter to Hearing Examiner Carter assigning protest.

* * * *

Supreme Court, U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

No. 01–1351

IN THE

Supreme Court of the United States

HALLEEN CHEVROLET, INC., *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Respondents.

On a Writ of Certiorari to the Court of Appeals of Ohio, Tenth Appellate District

RESPONDENTS' BRIEF IN OPPOSITION TO HALLEEN CHEVROLET'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a substitute examiner in an administrative proceeding can issue a recommendation based on a review of the record where there are no credibility issues over which the demeanor of the witnesses is of any importance?

2. Whether an administrative agency can review the record from an evidentiary hearing before an examiner and adopt the examiner's recommendation as its own decision without holding an entirely new evidentiary hearing?

PARTIES TO THE PROCEEDINGS

Respondent General Motors Corporation has no parent corporation and no publicly held company owns 10 percent or more of its stock. Respondent Fairchild Chevrolet has no parent corporation and no publicly held company owns 10 percent or more of its stock.

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STATEMENT OF THE CASE

Petitioners seek review of an unpublished Ohio court of appeals decision, which affirmed the trial court's decision upholding an administrative board order finding "good cause" to allow an existing Chevrolet dealer to relocate its operations. The court of appeals' decision, which the Ohio Supreme Court declined jurisdiction to review, decides no significant legal questions, but merely reflects a straightforward application of settled Ohio law. That decision applied an unbroken line of Ohio Supreme Court cases over five decades to decide that a substitute hearing examiner could issue a recommendation to an administrative board after reviewing transcripts of the hearing when the initial hearing examiner became unavailable to finish the case. The court of appeals' decision is consistent with the prevailing view around the country and this Court's decisions over the last 70 years on what process is due in administrative proceedings. Further review in this Court is therefore unwarranted.

Petitioners Halleen Chevrolet, Inc., et al. ("Halleen") filed an administrative protest over Respondent Fairchild Chevrolet's ("Fairchild's") plans to relocate its operations with the Ohio Motor Vehicle Dealer Board (the "Dealer Board"). A hearing was held before Hearing Examiner Robert Carter to determine whether Fairchild had "good cause" to relocate. OHIO REV. CODE ANN. § 4517.51 (Anderson 2001). The proceedings were transcribed, with 13 witnesses testifying either live or by way of deposition transcripts. Over 100 exhibits were admitted into the record. The hearing examiner, however, later stopped communicating with the Dealer Board and failed to issue any recommended ruling over eight months after the trial concluded. To comply with Ohio law—which imposes strict timetables for completing all administrative proceedings—the Dealer Board reassigned all of Mr. Carter's cases to new hearing examiners.

The substitute hearing examiner assigned to this case, Larry H. James—a distinguished and experienced hearing examiner for the Dealer Board—reviewed the entire record of the proceedings, carefully analyzed the exhibits, personally conducted a day-long inspection of the geographic areas in Cleveland and dealerships at issue with counsel and all parties present, and then heard another nearly full day of oral argument by counsel on all of the evidence presented at the hearing previously held.

After reviewing settled Ohio law, the substitute hearing examiner found that he did not need all of the witnesses—several of whom resided outside of Ohio—to travel back to Ohio to give the same testimony that they previously gave. Instead, Mr. James advised the parties that he would first review the record and then, based on that review, determine if he needed to hear any additional testimony to decide any of the questions presented. Halleen thereafter filed a petition for a writ of prohibition with the Ohio Supreme Court to compel Hearing Examiner James to retry the case and rehear all of the same witnesses again "live." *State ex rel. Halleen Chevrolet, Inc. v. Larry H. James*, 712 N.E.2d 759 (Ohio 1999). In the briefs filed with the Ohio Supreme Court in that action, the Dealer Board noted that the evidence presented at the initial hearing consisted primarily of objective "statistical" data that was easily subject to review by way of analyzing the transcripts and exhibits. After briefing on the issues, the Ohio Supreme Court dismissed Halleen's petition, authorizing Mr. James to proceed. *Id.*

After completing his review of the record, Mr. James determined that he did not need to hear any additional testimony to resolve the issues presented. As he found in his recommendation—which was 29 pages long and contained 93 paragraphs of findings and conclusions—the evidence clearly established "good cause" for Fairchild's planned relocation. After reviewing Halleen's objections to the hearing

examiner's recommendation, the Dealer Board adopted the recommendation without modification by operation of law, OHIO REV. CODE ANN. § 4517.58 (Anderson 2001), and issued an order to that effect. (Pet. App. 51a.) After reviewing the record again, the Franklin County, Ohio Court of Common Pleas affirmed the Dealer Board's decision. (Pet. App. 24a.) The Franklin County, Ohio Court of Appeals then reviewed the record yet again and unanimously affirmed the trial court's decision. (Pet. App. 1a.) The court of appeals further noted that "Halleen fail[ed] to point to any specific instances in the record where witness credibility was at issue." (Pet. App. 8a.) Halleen thereafter attempted to invoke the Ohio Supreme Court's discretionary jurisdiction to review the case, which was declined. (Pet. App. 49a.) Thus, five different tribunals have uniformly rejected the same arguments that Halleen makes here, repeatedly finding after reviewing the record that Halleen's arguments are not well taken. Halleen's petition should accordingly be denied.[1]

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals' Decision Is Consistent With This Court's Precedents.

Petitioners seek review based on their contention that an administrative board, which decides a case based on a hearing

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[1] Notably, the litigation and multiple appeals filed by Halleen in this matter have undermined the entire purpose of the statutory timetable governing this administrative proceeding, which was designed to conclude within 180 days from the initial filing. Fairchild has now been precluded from completing a simple business relocation for over five years. In *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), this Court noted that the filing of an administrative protest, as here, acted as an injunction precluding the proposed relocation without any prior showing of any likelihood of success on the merits. The Court reasoned that this procedure was acceptable because the statute at issue provided for a "prompt" resolution of the matter. Respondents respectfully submit that five years of delay is enough.

examiner's recommendation, may not replace the hearing examiner after the first examiner becomes unavailable, unless the subsequent examiner re-hears all the same witnesses again "live." In rejecting that contention, the court of appeals did not deny petitioners any "basic tenet [*sic*] of American law." (Pet. 11.) Rather, the court of appeals adhered to settled Ohio law, which squarely comports with this Court's time-tested principles concerning what constitutes due process in administrative proceedings.

It is settled law throughout the country that an administrative hearing officer need not actually hear or see the witnesses testify live, so long as the decision-maker (the agency) considers and appraises the evidence that is taken, which it may do by relying on subordinates that singly or collectively assemble the record and render a decision. In *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), for example, this Court held that a procedure consisting of notice of the issues presented and an opportunity to present evidence and arguments in writing was sufficient to satisfy both the statutory and constitutional requirements that the agency provide a "hearing" before it took action that imposed substantial costs on a railroad. The Court explicitly rejected the argument that any "hearing" conducted to resolve a factual dispute must include the right to present oral evidence and the right to confront and cross-examine witnesses, *id.* at 241-43, although in this case Halleen was also given all of those rights as well at the initial hearing.

Petitioners argue that the term "hearing" requires that the substitute hearing examiner conduct a *second* trial-type hearing in the proceedings before the administrative agency, but that proposition has been consistently rejected by the Court. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands."

Morrisey v. Brewer, 408 U.S. 471, 481 (1972). Due process in administrative proceedings does not require that the testimony be evaluated by an officer who heard and observed the witnesses "live." *E.g., Matthews v. Eldridge*, 424 U.S. 319 (1976) (Social Security Administration procedure used to determine benefits based principally upon questionnaires with no opportunity for an oral evidentiary hearing prior to termination of disability benefits did not violate due process); *see also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (due process afforded where trial examiner failed to issue recommendation to board and board made findings and issued decision solely on basis of the transcribed record).

This Court, in fact, has repeatedly affirmed that a written hearing alone comports with due process in many decision-making contexts. *E.g., University of Missouri v. Horowitz*, 435 U.S. 78 (1978) (deprivation of education in the form of expulsion from a university); *Goss v. Lopez*, 419 U.S. 565 (1975) (deprivation of education in the form of a 10-day suspension from high school). *See also Capitol Mortgage Bankers v. Cuomo*, 222 F.3d 151 (4th Cir. 2000) (deprivation of right to issue government-insured mortgages); *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991), *cert. denied*, 502 U.S. 857 (1991) (order requiring bank to increase capital by $725,000); *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989) (deprivation of money in the form of an order to take corrective actions based on hazardous waste release); *Quivara Mining Co. v. NRC*, 866 F.2d 1246 (10th Cir. 1989) (deprivation of property in the form of imposition of costly regulatory requirement); *Foster v. Ripley*, 645 F.2d 1142 (D.C. Cir. 1981) (deprivation of government job); *Frumkin v. Kent State University*, 626 F.2d 19 (6th Cir. 1980) (deprivation of government job).

The Federal and Ohio Rules of Civil Procedure also allow parties to read deposition transcripts to judges and juries under many different circumstances without calling the witnesses "live." In this case, all of the witnesses that testified at the

first hearing in this matter resided outside Franklin County, Ohio, where Hearing Examiner James conducted the continued proceedings. Under Ohio Rule Civ. P. 32, therefore, all of the witnesses could have testified by deposition even in a civil action in a court of law. It would make no sense to say that administrative agencies—which follow more informal and expeditious procedures—cannot review transcripts when judges and juries could have done so in the circumstances present here. In fact, Halleen's "due process" argument that all witnesses must appear "live" would render the use of deposition transcripts unconstitutional. That is untenable.

Consistent with this Court's many rulings, Ohio law provides that an administrative agency may substitute hearing examiners to fulfill its obligations and the substitute hearing examiner may review the record and issue a recommendation without having to "re-try" the entire case all over again. *Laughlin, et al. v. PUCO*, 216 N.E.2d 60, 61 (Ohio 1966) ("[i]t is not essential that a person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he reviews and examines the record of the proceeding."). The court of appeals simply followed these time-tested principles in rejecting petitioners' contention that due process required they be given an entirely new trial. The Dealer Board's assignment of a substitute hearing examiner who reviewed the entire record, personally inspected the relevant geographic areas, heard argument from counsel in a nearly day-long hearing, and then prepared a detailed and comprehensive 29-page recommended order to the Dealer Board, comports with this precedent, as the court of appeals' decision properly reflects.

Petitioners cite this Court's decision in *Morgan v. United States*, 298 U.S. 468 (1936) (*Morgan I*), for the proposition that "[t]he one who decides must hear." (Pet. 12.) Petitioners construe that bare quote to mean that a hearing examiner must hear all the witnesses "live," but that mischaracterizes the law.

Petitioners ignore *Morgan I's* progeny and further language in the decision itself that confirms that petitioners' proposition never was the law. This Court never ruled that the one who decides must hear the witnesses testify "live." To the contrary, this Court noted that the "[e]vidence may be taken by an examiner." *Id.* at 481. And this Court never said that the one who decides must even read the testimony, for it added that the "[e]vidence thus taken may be sifted and analyzed by competent subordinates." *Id.* The Court in *Morgan I* simply ruled that the one who decides must consider the evidence. This Court long ago rejected the petitioners' contention that due process requires more than what they were afforded, as the court of appeals below correctly ruled. *See also PBGC v. LTV*, 496 U.S. 633, 654 (1990) (an agency need only take whatever steps are necessary "to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.").

Likewise, the Dealer Board's adoption of the hearing examiner's recommendation without holding an entirely new hearing comports with these same principles. Halleen mischaracterizes Chapter 4517 of the Ohio Revised Code when it claims a "due process violation" because the Dealer Board "failed to deliberate" on the hearing examiner's recommendation. The Dealer Board did review the hearing examiner's recommendation, the petitioners' objections, and the record, but determined that it "declined to further deliberate on this matter." (Pet. App. 53a.) In this circumstance, the statute provides that the Dealer Board need not issue a separate decision if the Dealer Board opts to adopt the hearing examiner's recommendation. Section 4517.58 of the Ohio Revised Code specifically provides that "[i]f the Board fails to act within 30 days after the Board receives a proposed decision from the hearing officer . . . the proposed decision shall be considered approved." In this case, the Dealer Board adopted the hearing examiner's recommendation

without modification and issued a separate order approving the recommendation. (Pet. App. 51a.)

As the court of appeals correctly found, that process is consistent with due process guarantees. There is no requirement under the Court's precedents that the deciding board must observe the witnesses before making an agency determination. Even under *Morgan I*, the agency is expressly permitted to fulfill its responsibilities through the use of subordinates. Subordinates may take the evidence and analyze and sift through it on behalf of the deciding board. *Morgan*, 298 U.S. at 481. Under the Court's fourth *Morgan* decision, moreover, a deciding board need not obtain personal mastery of the evidence and facts in order for the agency to render a just and sound decision. *Morgan v. United States*, 313 U.S. 409 (1941). A deciding board can, and often must, defer to trusted subordinates.

As the court of appeals correctly ruled, the Dealer Board's statutory adoption of the hearing examiner's recommendation comports with due process guarantees because petitioners were afforded the opportunity for a meaningful hearing and consideration of their claims. Petitioners were accorded an initial lengthy "full trial"-type hearing and then a subsequent day-long hearing by a second hearing examiner during which the substitute examiner heard counsel's arguments on all the evidence presented—far more "due process" than is customarily provided in administrative proceedings. The hearing examiner's recommendation was approved by the Dealer Board after its review by operation of law. OHIO REV. CODE ANN. § 4517.58 (Anderson 2001). As this Court's precedents reflect, due process does not require that petitioners be given a second hearing before the Dealer Board. The court of appeals properly relied on settled precedent in rejecting the petitioners' claim to the contrary.

B. The Prevailing Rule Throughout The Country Is Consistent With The Court of Appeals' Decision.

Petitioners argue that the court of appeals' decision contradicts the "vast majority of federal circuit courts and other highest state courts." (Pet. at 11.) Petitioners even go so far as to contend that "[f]ederal courts in the First, Second, Third, Fourth, Fifth and Eighth Circuits have explicitly stated that a single hearing examiner cannot be replaced by a substitute hearing examiner, who does not observe the character and demeanor of the witnesses, where material factual issues are unresolved." (Pet. at 11.) That statement, however, misstates those circuit court decisions. In fact, virtually every decision cited by petitioners supports the court of appeals' decision below.

Contrary to petitioners' arguments, the prevailing view throughout the country is that the decision-maker in administrative proceedings need not hear the witnesses first-hand, so long as the hearing officer or agency reviews and considers the record. *See, e.g., Appeal of Dell*, 668 A.2d 1024, 1033-34 (N.H. 1995) (board can issue decision without hearing witnesses live); *Lewis v. Statewide Grievance Committee*, 669 A.2d 1202, 1208-09 (Conn. 1996) (agency members allowed to review transcript); *Rosales v. Department of Labor*, 40 Wn. App. 712, 715 (1985) (upheld substitution of hearing examiner and dismissed due process claim as "contrary to the bulk of judicial authority"); *Schmidt v. Beeson Plumbing & Heating*, 869 P.2d 1170, 1177-78 (Alaska 1994) (agency may "hear" evidence by reviewing record); *Messer v. Snohomish Cty. Bd. of Adj.*, 578 P.2d 50, 59 (Wn. 1978) (board can review record); *Peak v. Unemployment Compensation Board of Review*, 501 A.2d 1383, 1389 (Pa. 1985) (administrative agencies may review record); *University Community Hosp. v. Dept. of Health and Rehab. Services*, 555 So.2d 922, 923-24 (Fla. App. 1990) (same); *SBC Communications, Inc. v FCC*, 56 F.3d 1484, 1496-97 (D.C.

Cir. 1995) (administrative disputes with respect to economic facts do not require oral hearing).

One of the decisions cited by petitioners actually highlights the prevailing rule. In *Citizens for Rewastico Creek v. Commissioners of Hebron*, 508 A.2d 493 (Md. 1986), Maryland's highest court rejected the same line of argument advanced by petitioners in this case, finding no due process violation where a substitute examiner declined to re-hear all of the witnesses "live." As the court noted, the "general rule is that in the absence of specific statutory direction to the contrary the deciding member or members of an administrative or quasi-judicial agency need not hear the witnesses testify." *Id.* 499 (citations omitted). As the court summarized the law, the "general rule" is that "it is enough if those who decide have considered and appraised the evidence." *Id.*

The prevailing view, moreover, is reflected in multiple treatises. As Professor Davis noted:

> 'The employee who presides at the reception of evidence pursuant to section 556 . . . shall make the recommended decision or initial decision required by section 557 . . . unless he becomes unavailable to the agency.' But even what is called an "initial" decision is only a recommendation, because in reviewing it the agency under § 557(b) has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.' *That means that the normal system is fundamentally one in which the decision is made, even when demeanor of witnesses is vital, by officers who have neither seen nor heard the witnesses; the decision is not made by the officer who has seen and heard the witnesses.*

Davis, K. *Administrative Law Treatise* § 17.17 (2d ed. 1980) (emphasis added). The current edition of Professor Davis' treatise likewise notes that courts throughout the country have acknowledged that administrative agencies can act after

reviewing transcribed testimony. Davis, K. *Administrative Law Treatise* § 9.1, et seq. (3d ed. 1994). Other treatises on administrative law have reached the same conclusion. *See also* Koch, C., *Administrative Law and Practice* (2d ed. 1997) § 5.23.

Ohio law reflects the general rule that agencies may substitute hearing examiners if the initial hearing examiner becomes unavailable and the substitute examiner reviews and appraises the evidence. The Ohio Supreme Court has repeatedly rejected the requirement that petitioners advocate—*i.e.*, requiring every witness to be "live" in every administrative proceeding. In *State ex rel. Ormet Corporation v. Industrial Commission of Ohio*, 561 N.E.2d 920 (Ohio 1990), for example, the Ohio Supreme Court rejected petitioners' argument, finding that the law does not require "personal attendance" at the administrative hearing so long as the evidence is "considered and appraised." *Id.* at 922-23. *See also State ex rel. Ohio Building Restoration v. Industrial Commission of Ohio*, 593 N.E.2d 1388, 1389 (Ohio 1992) (agency commissioner need not hear witnesses at hearing so long as he did in "some meaningful manner, consider evidence obtained at hearing.") (citations omitted).

Likewise, in *Laughlin*, 216 N.E.2d at 60, the Ohio Supreme Court directly addressed the issue here. In that case, the Public Utilities Commission of Ohio assigned a hearing examiner to hear a protest before the Commission. The initial hearing examiner (who started the hearing) resigned and another hearing examiner completed the hearing. The second hearing examiner made no findings and the transcript and exhibits were transferred to a third hearing examiner who issued a recommendation to the Commission. The appellants in *Laughlin* contended that they were denied a fair hearing because the Commission assigned a hearing examiner to prepare a recommendation who had not presided at the hearing. *Id.* As the Ohio Supreme Court held, however, "[that] contention is without merit. It is not essential that a

person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he reviews and examines the record of the proceeding." *Id.*

In *Ritchie Photographic v. Limbach*, 644 N.E.2d 312, 313 (Ohio 1994), the Ohio Supreme Court decided the same issue and again rejected the argument advanced by petitioners. In that case, one hearing examiner took testimony and the second hearing examiner decided the case by examining the record. The Ohio Supreme Court rejected the appellants' claims that the substitution of hearing examiners constituted a denial of "due process." *See also Dworkin v. PUCO*, 111 N.E.2d 389 (Ohio 1953) (no due process violation where agency members made a decision based solely on transcripts).[2]

The purported "conflict" that Halleen tries to create, moreover, simply does not exist. The First Circuit's decision in *New England Coalition v. Nuclear Regulatory Comm'n*, 582 F.2d 87 (1st Cir. 1978), does not provide the conflict that petitioners contend. In that case, the court held that due process was *not* violated by the substitution of hearing examiners even where there were purported credibility issues involving the expert witnesses. While the court noted the Administrative Procedure Act's ("APA's") preference for

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[2] Petitioners try to distinguish *Laughlin* and *Ritchie Photographic* by claiming that the underlying issues present in those cases were based "entirely upon questions of law," but that is not true. There is no language in *Laughlin* or *Ritchie* suggesting that there were no "credibility" issues present. The complaining party in *Laughlin* argued that the hearing examiner prepared "findings" and resolved factual issues without hearing and observing the witnesses. *Laughlin*, 216 N.E.2d at 60. *Ritchie Photographic* was likewise not limited to the resolution of a legal issue. The appellant specifically claimed that the agency "erred in its *factual* conclusion" and argued that it was denied due process because "the BTA replaced the attorney-examiner who had conducted the evidentiary hearing with another attorney-examiner who worked from a cold record' to decide [the case]." 644 N.E.2d at 313. That is the same claim petitioners are making here.

hearing decisions made by someone who heard the evidence, it also expressly recognized, as does the APA itself, that decisions are sometimes made by substitute hearing examiners because the initial examiner becomes "unavailable to the agency." *Id.* at 99-100; 5 U.S.C. § 554(d).

The Second Circuit's decision likewise does not support the petitioner's contention of a conflict with the court of appeals' decision below. In *Art National Manufacturers Distributing Co. v. Federal Trade Commission,* 298 F.2d 476, 477 (2nd Cir. 1962), *cert. denied*, 370 U.S. 939 (1962), the Second Circuit ruled that there was *no* due process violation in substituting hearing examiners because the Commission made its findings based on uncontroverted evidence not involving credibility, just as the court of appeals found below. The Second Circuit, moreover, five years after its decision in *Art National Manufacturers*, expressly ruled that an administrative hearing examiner need not see the witnesses testify "live," even where credibility is an issue. *Utica Mutual Insurance Co. v. Vincent*, 375 F.2d 129, 132 (2nd Cir.), *cert. denied*, 389 U.S. 839 (1967). Current law in the Second Circuit thus directly contradicts petitioners' contention.

Likewise, in *National Labor Relations Board v. Stocker Mfg. Co.*, 185 F.2d 451 (3rd Cir. 1950)—another case cited by petitioners—the Third Circuit found *no* due process violation when the trial examiner died before preparing a report and the substitute examiner issued his recommendation to the board based only on a review of the transcripts. As the Court noted: "The doctrine of these cases clearly permits the Board to make its findings and predicate its order upon the written record without hearing the witnesses testify or availing itself of findings and recommendations prepared by the officer who heard and observed the witnesses testify." *Id.* at 453.

The Fourth Circuit's decision in *Appalachian Power Co. v. Federal Power Commission*, 328 F.2d 237 (4th Cir. 1964), *cert. denied*, 379 U.S. 829 (1964), similarly does not support

any conflict. In that case, the Fourth Circuit found no due process violation where hearing examiners were substituted in an administrative proceeding. While the court did suggest in dicta that the substitution of trial examiners "might be improper" where the demeanor of witnesses is an important factor, *id.* at 240, it never reached that question because, as with the court of appeals below, it determined that demeanor was not an issue in the case. The court of appeals here likewise ruled that petitioners never identified any issues below where demeanor was of any importance. (Pet. App. 8a.) Although the Fourth Circuit's decision reflects a now-outdated view of accepted practice in administrative proceedings, it only confirms the propriety of the court of appeals' decision below.

Petitioners further claim that the Fifth Circuit's decision in *Pigrenet v. Boland Marine & Manufacturing Co.*, 631 F.2d 1190 (5th Cir. 1980) illustrates a conflict. It does not. Petitioners fail to tell this Court that an en banc panel of the Fifth Circuit subsequently *reversed* its earlier decision in that case. *Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091 (5th Cir. 1981). The court vacated its earlier decision that there was a due process violation, finding that the complainant had waived that argument and the court therefore did not decide it. *Id.* at 1095.

The Eighth Circuit's older decision from 1954 in *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d 106 (8th Cir. 1954) is the only circuit decision that petitioners cite that comes anywhere close to supporting their position, but even it does not do so. In that case, the Eighth Circuit ruled that the APA generally would not require a substitute hearing examiner to engage in a *de novo* hearing unless a credibility evaluation was necessary. *Id.* at 114. The court interpreted the APA to "establish the general practice and policy in the examiner system of having recommended or initial administrative decisions made by the trial examiner who had received the evidence . . . as a measure of ensuring proper

credibility evaluation." *Id.* The court recognized, however, that "a change in personnel occurring during the course of or at the close of an administrative hearing does not as such give rise to constitutional repugnance in a decision or order made by the administrative tribunal on the basis of the previous hearing." *Id.* at 112, *citing Twin City Milk Producers Ass'n v. McNutt*, 122 F.2d 564, 569 (8th Cir. 1941); *NLRB v. Stocker Mfg. Co.*, 185 F.2d 451, 453 (3rd Cir. 1950). The court squarely recognized that the "unavailability" of the initial examiner may necessitate the substitution of examiners without creating any due process violation. The Eighth Circuit's decision thus does not evidence the sort of dissension among the circuits that would warrant this Court's review.

The state court decisions that petitioners cite likewise do not reflect any conflict among the courts below. Those cases nearly all confirm the prevailing rule, and, to the extent they do not, they are based on particular statutes or issues that require the fact-finder to resolve credibility issues first-hand. *In re Grimm*, 635 A.2d 456 (N.H. 1993), for instance, the New Hampshire Supreme Court analyzed peculiar procedural issues relating to that case (there, the issue was whether sexual contact had occurred), but the Court reaffirmed that "the general rule in administrative proceedings is that an administrative officer may act on a written record of testimony by witnesses whom he has not personally seen or heard." *Id.* at 459 (citations omitted); *see also In re Seacoast Anti-Pollution League*, 490 A.2d 1329, 1335 (N.H. 1984) (noting general rule that an administrative officer may act on a written record and affirming review of record where experts were in conflict because review is a function of logical analysis). The *Adams v. Industrial Comm'n of Arizona*, 710 P.2d 1073 (Ariz. 1985) case, as well, limited its holding to the narrow issue of whether a substituted ALJ could *reverse* a prior benefits award. Even those cases that required "live" testimony did so only when the honesty of two witnesses was in direct conflict, generally involving completely contradictory accounts of a

single conversation or incident. *See, e.g., Addison v. Review Bd. of Ind. Employment Sec.*, 397 N.E.2d 1037 (Ind. App. 1979) (conflicting testimony on reason employee was fired); *Stevens Chevrolet, Inc. v. Commission on Human Rights*, 498 A.2d 546 (D.C. Ct. App. 1985) (same). Those cases thus do not support any conflict here.

In short, petitioners fail to identify any legal authority contradicting the court of appeals' decision, any legitimate circuit split on the issues raised, or any other reason to justify this Court's review of the disposition of petitioners' claims. To the contrary, the court of appeals' decision simply applied the prevailing rule throughout the country.

C. Separate And Apart From The Other Defects In The Petitioners' "Due Process" Argument, There Were No Disputed Issues Below Over Which Demeanor Was Of Any Importance.

Even accepting all of petitioners' concerns as legitimate grounds for review, this case would not present the right vehicle for assessing the questions presented by petitioners.

Petitioners argue that conflicting questions of "demeanor" were somehow important, but, as the court of appeals correctly found, there was not a single evidentiary issue of any kind below over which the hearing examiner had to decide the "honesty" of a witness or otherwise assess his or her demeanor. (Pet. App. 8a.) The trial consisted almost exclusively of differing opinions over undisputed facts and objective data, which Hearing Examiner James could easily analyze from the record. "Good cause," which the statute required for Fairchild's planned relocation, existed for the proposed relocation based on the undisputed facts alone. As the Dealer Board noted in its papers to the Ohio Supreme Court in Halleen's prohibition proceedings, the hearing consisted largely of objective data and evidence that could be easily reviewed without regard to demeanor. Halleen, in fact,

concedes that the "raw data in this case was largely unchallenged." (Pet. at 6.)

Although the experts presented differing theories, which required an analysis of the information presented by the parties, the underlying objective data was almost entirely undisputed. The "credibility" of expert opinions is often analyzed through a review of exhibits and deposition transcripts. Numerous decisions—including multiple decisions cited by the petitioners themselves—have repeatedly recognized that demeanor is not important in resolving differing expert opinions. *E.g.*, *New England Coalition on Nuclear Pollution*, 582 F.2d at 100 (credibility of experts is "a function of logical analysis, credentials, data base, and other factors readily discernible to one who reads the record," not of demeanor); *see also Citizens for Rewastico Creek*, 508 A.2d at 502 (same).

After reviewing the entire evidentiary record in this case, Hearing Examiner James correctly determined that he did not need to hear any additional evidence to resolve any questions of "demeanor" or "honesty." Nor did Hearing Examiner James need to make such determinations to reach a decision in this matter. Thus, even if Ohio law had not already addressed the petitioners' claimed error, that claimed error would have no application here. To the extent the decisions the petitioners cite on credibility determinations even reflect a conflict of any kind, there is no such issue to resolve here.

Notably, although the petitioners now argue that the second hearing examiner could not review transcripts of testimony, that entire line of argument contradicts their own conduct below. During the hearing before the first hearing examiner, Halleen introduced multiple deposition transcripts into the record and asked the hearing examiner to review those transcripts and consider them in reaching a decision. Those witnesses addressed multiple "factual" issues, but never testified live before the first hearing examiner.

Given the court of appeals' determination that no credibility issues were ever at issue below, this case does not even present an adequate vehicle for review of the questions presented by petitioners, rejecting any need for review by this Court.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court deny petitioners' writ.

Respectfully submitted,

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